83-1073

No. 83-——

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MAIDSVILLE COAL COMPANY, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether the National Labor Relations Board may issue a *Gissel* bargaining order in "less extraordinary cases marked by less pervasive" employer unfair labor practices without first providing a detailed analysis of the residual impact of the unfair practices, the likelihood of recurring employer misconduct, and the potential effect of the Board's less severe remedies?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	7
A. Although Upheld As Sufficient By The Fourth Circuit's *En Banc* Decision, The Board's Use Of Boilerplate Language To Justify Its Bargaining Order Conflicts With The Rule Of Elucidation Announced By This Court In *NLRB v. Gissel Packing Co.*	7
B. The Board's Persistent Failure to Justify Its Imposition Of A Bargaining Order With Specific Findings In Accordance With The *Gissel* Criteria Has Created A Conflict Among The Circuits With Respect To The Review And Enforcement Of The Board's Decisions	9
CONCLUSION	14

TABLE OF AUTHORITIES

CASES	Page
Chromalloy American Corp. v. NLRB, 620 F.2d 1120 (5th Cir. 1980)	13
Donn Products, Inc. v. NLRB, 613 F.2d 162 (6th Cir. 1980)	11
First Lakewood Associates v. NLRB, 582 F.2d 416 (7th Cir. 1978)	12
Fitzgerald v. Century Park, Inc., 642 F.2d 356 (9th Cir. 1981)	12
Hedstrom Co. v. NLRB, 558 F.2d 1137 (3d Cir. 1977)	8, 9
J. J. Newberry Co. v. NLRB, 645 F.2d 148 (2d Cir. 1981)	11
Maidsville Coal Co., Inc. and UMWA, District 31, 257 N.L.R.B. 1106 (1981)	2
NLRB v. American Cable Systems, Inc., 427 F.2d 446 (5th Cir. 1970)	13
NLRB v. American Spring Bed Manufacturing Co., 670 F.2d 1236 (1st Cir. 1982)	10, 11
NLRB v. Appletree Chevrolet, Inc., 608 F.2d 988 (4th Cir. 1979)	6, 7
NLRB v. Century Moving & Storage, Inc., 683 F.2d 1087 (7th Cir. 1982)	12
NLRB v. Chester Valley, Inc., 652 F.2d 263 (2d Cir. 1981)	11
NLRB v. Cott Corp., 578 F.2d 892 (1st Cir. 1978)	11
NLRB v. Dadco Fashions, Inc., 632 F.2d 493 (5th Cir. 1980)	13
NLRB v. Eastern Steel Co., 671 F.2d 104 (3d Cir. 1982)	13
NLRB v. Ely's Foods Inc., 656 F.2d 290 (8th Cir. 1981)	13
NLRB v. Gissel Packing Co., 395 U.S. 575 (1969)	6, 7
NLRB v. Jamaica Towing, Inc., 632 F.2d 208 (2d Cir. 1980)	11
NLRB v. Keystone Pretzel Bakery, Inc., 696 F.2d 257 (3d Cir. 1982)	13
NLRB v. Maidsville Coal Co., Inc., 114 L.R.R.M. 2844 (4th Cir. 1983)	1
NLRB v. Maidsville Coal Co., Inc., 693 F.2d 1119 (4th Cir. 1982)	1, 2

TABLE OF AUTHORITIES—Continued

	Page
NLRB v. Marion Rohr Corp., Inc., 714 F.2d 228 (2d Cir. 1983)	11
NLRB v. Miller Trucking Service, Inc., 445 F.2d 927 (10th Cir. 1971)	12
NLRB v. Pace Oldsmobile, Inc., 681 F.2d 99 (2d Cir. 1982)	11
NLRB v. Permanent Label Corp., 657 F.2d 512 (3d Cir. 1981)	13
NLRB v. Pilgrim Foods, Inc., 591 F.2d 110 (1st Cir. 1978)	11
NLRB v. Rexair, Inc., 646 F.2d 249 (6th Cir. 1981)	11
NLRB v. Suburban Ford, Inc., 646 F.2d 1244 (8th Cir. 1981)	13
NLRB v. Valley Plaza, Inc., 715 F.2d 237 (6th Cir. 1983)	11
NLRB v. Western Drug, 600 F.2d 1324 (9th Cir. 1979)	12
NLRB v. Wilhow Corp., 666 F.2d 1294 (10th Cir. 1981)	12
Patsy Bee, Inc. v. NLRB, 654 F.2d 515 (8th Cir. 1981)	13
Peerless of America, Inc. v. NLRB, 484 F.2d 1108 (7th Cir. 1973)	9, 12
Red Oaks Nursing Home, Inc. v. NLRB, 633 F.2d 503 (7th Cir. 1980)	9, 10, 12
Southern Moldings, Inc. v. NLRB, 715 F.2d 1069 (6th Cir. 1983)	11, 12
United Services For The Handicapped v. NLRB, 678 F.2d 661 (6th Cir. 1982)	11
STATUTES	
28 U.S.C. § 1254(1)	2
National Labor Relations Act, 29 U.S.C. § 151, *et seq.*	
Section 7, National Labor Relations Act, 29 U.S.C. § 157	2

TABLE OF AUTHORITIES—Continued

	Page
Section 8(a)(1), National Labor Relations Act, 29 U.S.C. § 158(a)(1)	2, 3, 5
Section 8(a)(3), National Labor Relations Act, 29 U.S.C. § 158(a)(3)	2, 3, 5
Section 8(a)(5), National Labor Relations Act, 29 U.S.C. § 158(a)(5)	2, 3, 5
Section 10(b), National Labor Relations Act, 29 U.S.C. § 160(b)	3
Section 10(c), National Labor Relations Act, 29 U.S.C. § 160(c)	3
Section 10(e), National Labor Relations Act, 29 U.S.C. § 160(e)	2, 3, 4, 6
Section 10(f), National Labor Relations Act, 29 U.S.C. § 160(f)	6

IN THE

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MAIDSVILLE COAL COMPANY, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, Maidsville Coal Company, Inc.[1] prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, sitting *en banc* on rehearing, is not published in the Federal Reporter, but is reported at 114 L.R.R.M. 2844 (1983). The *en banc* opinion is reprinted in the Appendix at A1-A5. The opinion of the Fourth Circuit's original panel decision is reported at 693 F.2d

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[1] Petitioner, Maidsville Coal Company, Inc., will henceforth be referred to as "Maidsville Coal."

1119 (1982), and is reprinted in the Appendix at A6-A26. The decision and order of the National Labor Relations Board are reported at 257 N.L.R.B. 1106 (1981), and are reprinted in the Appendix at A29-A136.

JURISDICTION

On November 15, 1982, the panel decision of the United States Court of Appeals for the Fourth Circuit was rendered. On rehearing, the *en banc* judgment was entered on October 5, 1983. Because the ninetieth day from the entry of the *en banc* judgment falls on January 3, 1984, this petition is timely filed. The jurisdiction of this Court to review this case on certiorari rests on 28 U.S.C. § 1254 (1) and 29 U.S.C. § 160(e).

STATUTES INVOLVED

This case involves the following provisions of the National Labor Relations Act (29 U.S.C. § 151, *et seq.*), which, in pertinent part, states:

1. Section 7 (29 U.S.C. § 157):

> Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

2. Section 8(a)(1), (3) and (5) (29 U.S.C. §§ 158 (a)(1), (3) and (5)):

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

. . . .

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization;

. . . .

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

3. Sections 10(b), (c) and (e) (29 U.S.C. §§ 160(b), (c) and (e)):

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint. . . .

(c) . . . If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter. . . .

. . . .

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceedings and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. . . . The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record.

STATEMENT OF THE CASE

Maidsville Coal has been engaged in the nonretail sale of coal for approximately twelve years at its Maidsville, West Virginia, facility. In March, 1979, the United Mine Workers of America [2] began efforts to organize Maids-

[2] The United Mine Workers of America will henceforth be referred to as the "UMWA."

ville Coal's production employees. On April 19, 1979, the UMWA filed an election petition with the Board, and approximately one week later, the union charged that Maidsville Coal had committed certain unfair labor practices during the course of the union's organizational drive.

After a hearing, on March 16, 1981, Administrative Law Judge Robert G. Romano [3] held that Maidsville Coal had violated §§ 8(a)(1), (3) and (5) of the National Labor Relations Act. Although Maidsville Coal contended that as of April 10, 1979, the UMWA had obtained signed authorization cards from only four of the nine bargaining unit employees, the ALJ concluded that the UMWA had obtained signed cards from a majority of five.[4] Finally, the ALJ recommended that Maidsville Coal be ordered to bargain with the UMWA upon request, explaining his recommendation as follows:

> I specifically conclude and find the unfair labor practices committed by the Employer were so pervasive and extensive that the possibility of erasing their effects on the employees and ensuring a fair election by use of the traditional remedies is slight. With employees being so conditioned, I find that in this case, employee sentiment, as expressed by the authorization cards is best protected by a bargaining order.

[A127]. Maidsville Coal filed exceptions to the ALJ's findings and conclusions, but, in a summary opinion, the Board adopted his findings and conclusions, including the recommended order to bargain.

When Maidsville Coal declined to bargain with the UMWA, the Board applied to the United States Court of

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[3] Administrative Law Judge Romano will henceforth be referred to as the "ALJ."

[4] Maidsville Coal argued in vain that Richard Heller, who signed a card, was a supervisor and should have been excluded from the proposed bargaining unit and that Jeff Freeman, who had not signed a card, should have been included.

Appeals for the Fourth Circuit to enforce its order.[5] In a panel decision, the Fourth Circuit upheld the Board's findings and conclusions with respect to the commission of the unfair labor practices. With one judge dissenting, however, the panel majority found that both the ALJ and Board opinions did not satisfy the prerequisites for issuing bargaining orders set forth in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), and *NLRB v. Appletree Chevrolet, Inc.*, 608 F.2d 988 (4th Cir. 1979). Specifically, the panel majority held that the ALJ and the Board had failed to sufficiently explain the reasons that "an election [would] not adequately reflect employee preferences" and that the Board's traditional remedies (e.g., cease-and-desist orders) would not effectively "erase any hint of coercion occasioned by the employer's unfair labor practices" [A11]. Accordingly, the panel majority refused to enforce the bargaining order and remanded the case for further consideration.

Prior to oral argument, Maidsville Coal moved to supplement the record by adding its president's affidavit. The affidavit showed that the employee complement had changed dramatically since the alleged unfair labor practices occurred in 1979.[6] The panel majority granted Maidsville Coal's motion and suggested that the Board take it into consideration on remand. [A13-A14].

Upon petition by the Board, the Fourth Circuit reheard the case *en banc* and, on October 5, 1983, reversed the panel majority in a 6-4 decision, ruling that the Board's

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[5] The Fourth Circuit had jurisdiction under 29 U.S.C. §§ 160(e) and (f).

[6] Indeed, Petitte's affidavit shows that the number of employees who would be included in the appropriate bargaining unit increased from nine in 1979 to nineteen at the time of oral argument in 1982. Moreover, of those nineteen, only five were in the original bargaining unit of nine employees, two of whom had signed authorization cards in 1979.

explanation of the reasons supporting its order to bargain was sufficient to satisfy the requirement of *Gissel* and *Appletree Chevrolet* [A5].

REASONS FOR GRANTING THE WRIT

A. Although Upheld As Sufficient By The Fourth Circuit's *En Banc* Decision, The Board's Use Of Boilerplate Language To Justify Its Bargaining Order Conflicts With The Rule Of Elucidation Announced By This Court In *NLRB v. Gissel Packing Co.*

In *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), this Court reiterated "that secret elections are generally the most satisfactory—indeed the preferred—method of ascertaining whether a union has majority support." *Id.* at 602. Accordingly, the Court limited the Board's discretion in imposing bargaining orders upon employers to two categories of cases. First, in "exceptional cases" wherein the employer has committed such "outrageous and pervasive" unfair labor practices that "their coercive effects cannot be eliminated" and "a fair and reliable election cannot be had," the Board may bypass the election process and order an employer to bargain with a union without first inquiring into majority status.[7] Second, in "less extraordinary" cases which are marked by "less pervasive" unfair labor practices, the Board may issue a bargaining order *only* in the event that it first finds specifically that (1) "at one point the union had a majority"; (2) "the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight"; and (3) "employee sentiment expressed through cards would, on balance, be better protected by a bargaining order. . . ." *Id.* at 614-15.[8]

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[7] These are the so-called "Category I" cases.

[8] These are the so-called "Category II" cases.

In the case *sub judice*, a "Category II" case, the Fourth Circuit's *en banc* decision has allowed the Board to justify its issuance of a bargaining order against Maidsville Coal by merely reciting, in boilerplate form, this "Court's explanation of what kind of showing is necessary for the issuance of a bargaining order" [A12]. Despite the requirements of *Gissel*, the Board has not provided a detailed analysis justifying its imposition of a bargaining order. First, the Board has failed to provide an explanation of why Maidsville Coal's past practices would have an adverse residual impact on the employees' ability to vote freely and in an uninhibited fashion during an election. Obviously, the change in employee complement would be relevant to the "residual impact" determination; nevertheless, the Board has refused to consider the change.

Moreover, the Board did not provide any analysis of the likelihood of recurring employer misconduct. As repeatedly pointed out by Maidsville Coal, most of the unfair labor practices were committed by Maidsville Coal before it sought legal counsel and were committed in ignorance of federal labor law. There exists no indication that the Board took into consideration Maidsville Coal's record after it hired labor counsel and no elucidation of reasons why Maidsville Coal's labor practices are likely to recur.

Finally, the Board failed to explain why its less severe remedies probably would not have erased any residual impact of Maidsville Coal's past practices and would not have ensured a fair election. Specifically, "[t]here is no indication that traditional remedies such as cease-and-desist orders, the mailing or the reading of notices to employees during plant time, the posting of notices on Company billboards, or the granting to the Union of access to employees during work time at the plant, or a court injunctive order under § 10(j) (20 U.S.C. § 160(j)) as a last resort, will not remedy the unfair labor practices

charged here." *Hedstrom Co. v. NLRB*, 558 F.2d 1137, 1152 (3d Cir. 1977).

Clearly, the *en banc* majority has misperceived the scope of the Board's discretion to revert to the extreme remedy of the bargaining order by failing to require the Board to justify its reasoning before enforcing the Board's order. Thus, the decision of the *en banc* majority is in direct conflict with the principles announced in this Court's *Gissel* decision. Accordingly, review of the Fourth Circuit's *en banc* majority decision is warranted.

B. The Board's Persistent Failure to Justify Its Imposition Of A Bargaining Order With Specific Findings In Accordance With The *Gissel* Criteria Has Created A Conflict Among The Circuits With Respect To The Review And Enforcement Of The Board's Decisions.

Despite repeated requests from various courts of appeal in "Category II" cases, the Board continues to refuse to advance its reasoning, in accordance with the *Gissel* criteria, for the imposition of a bargaining order. As noted by the Seventh Circuit:

> Since the Supreme Court's decision in *Gissel*, the NLRB has been obligated to give reasons justifying the use of a bargaining order. In *Peerless of America, Inc. v. NLRB*, 484 F.2d 1108 (7th Cir. 1973), this court explained the importance of the Board's obligation to give "a detailed analysis" of the "possibility of holding a fair election in terms of any continuing effect of misconduct, the likelihood of recurring misconduct, and the potential effectiveness of ordinary remedies," 484 F.2d at 1118, as an aid to judicial review. . . . [E]ven a cursory examination of the decisions applying *Gissel* in this circuit and in other circuits reveals that the Board has declined repeatedly to assist the courts with [its] expertise by revealing reasons for issuing *Gissel* bargaining orders [citations omitted]. . . . Furthermore, this reticence persists despite repeated judicial references

> to the importance of the Board's making known its reasoning as an aid to judicial review. . . . It is unfortunate that this fundamental question of employee representation rights receives so little attention from the Board. . . .

Red Oaks Nursing Home, Inc. v. NLRB, 633 F.2d 503, 508-09 (7th Cir. 1980). The Board's "reticence" was also observed by Judge Bryan in the opinion of the panel majority below:

> With apparently necessary repetition, we reiterate that elections are the preferred measure of employee sentiment under the Act. . . . [B]efore a bargaining order may issue, the Board must demonstrate, with particularity, why traditional remedies probably will not protect employees' rights under § 7 of the Act.

[A12].

Although each factual setting is different, the circuit courts of appeal have responded in essentially three ways to the Board's recurrent failure to provide its reasoning for issuing bargaining orders. In the First, Sixth, Ninth and Tenth Circuits, unless the Board specifically articulates its *Gissel* analysis for issuing a bargaining order, an application for enforcement thereof in a "Category II" case will not be enforced, but will be remanded to the Board for further explication. For example, in *NLRB v. American Spring Bed Manufacturing Co.*, 670 F.2d 1236 (1st Cir. 1982), the court stated that paying "lip service" to the requirements of *Gissel* would not be sufficient in that circuit to justify the enforcement of a bargaining order. Instead, the Board's decision must manifest

> precise reasons for concluding that: (1) the employer's unfair labor practices so undermined the Union's majority that conducting a fair election would be unlikely; (2) the employer's unlawful conduct was likely to continue; and (3) the ordinary remedies of back pay, reinstatement, and posting of notices would be inadequate to ensure a fair election.

Id. at 1247. The court refused to enforce the bargaining order because the Board "proferred no reasons to explain why the Company would not obey a cease and desist order accompanied by the posting of appropriate notices." *Id.* at 1248. *See also NLRB v. Pilgrim Foods, Inc.*, 591 F.2d 110 (1st Cir. 1978); *NLRB v. Cott Corp.*, 578 F.2d 892 (1st Cir. 1978).[9]

The Second Circuit has also stated that it will not enforce bargaining orders which are not first substantiated by detailed *Gissel* findings. In *NLRB v. Marion Rohr Corp., Inc.*, 714 F.2d 228 (2d Cir. 1983), the court reiterated the principle that the bargaining order may only be issued after the Board "demonstrates that an election is unlikely to reflect the uncoerced preference of the bargaining unit." *Id.* at 230. The court reasoned that "[t]he listing of unfair labor practices followed by the conclusory statement that a fair election is no longer possible does not satisfy the Board's responsibility to analyze the attending circumstances." *Id.* at 231. *See also NLRB v. Pace Oldsmobile, Inc.*, 681 F.2d 99 (2d Cir. 1982); *NLRB v. Chester Valley, Inc.*, 652 F.2d 263 (2d Cir. 1981); *J. J. Newberry Co. v. NLRB*, 645 F.2d 148 (2d Cir. 1981); *NLRB v. Jamaica Towing, Inc.*, 632 F.2d 208 (2d Cir. 1980).

Likewise, the Sixth Circuit scrutinizes Board decisions "more closely when [the Board] has imposed the very strong remedy of issuing a bargaining order. . . ." *NLRB v. Rexair, Inc.*, 646 F.2d 249, 250 (6th Cir. 1981). *See also NLRB v. Valley Plaza, Inc.*, 715 F.2d 237 (6th Cir. 1983); *United Services For The Handicapped v. NLRB*, 678 F.2d 661 (6th Cir. 1982); *Donn Products, Inc. v. NLRB*, 613 F.2d 162 (6th Cir. 1980). *Cf., South-*

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[9] That the instant case conflicts with the decisions of the First Circuit is made clear by the ALJ's admission that he refused to consider *Pilgrim Foods* because he was only "bound to apply established Board precedent." [A127].

ern Moldings, Inc. v. NLRB, 715 F.2d 1069 (6th Cir. 1983).

The Ninth and Tenth Circuits also remand to the Board for further consideration when the Board fails to set forth its specific reasons for issuing a bargaining order. *See, e.g., Fitzgerald v. Century Park, Inc.*, 642 F.2d 356 (9th Cir. 1981); *NLRB v. Western Drug*, 600 F.2d 1324 (9th Cir. 1979); *NLRB v. Wilhow Corp.*, 666 F.2d 1294 (10th Cir. 1981); *NLRB v. Miller Trucking Service, Inc.*, 445 F.2d 927 (10th Cir. 1971).

A second response to the Board's failure to justify its imposition of a bargaining order using the *Gissel* guidelines is found in the opinions of the Seventh Circuit, wherein the court undertakes to conduct its own *Gissel* analysis. In *NLRB v. Century Moving & Storage, Inc.*, 683 F.2d 1087 (7th Cir. 1982), the court explained its reasoning as follows:

> Where the Board has not given us the benefit of its expertise by making specific findings showing that a bargaining order is justified, we have reluctantly made the essential analysis ourselves, to avoid further delay inherent in a remand to the Board. . . . The Board's failure to make the necessary specific findings here causes us to follow this course.

Id. at 1093. *See also Red Oaks Nursing Home, Inc. v. NLRB*, 633 F.2d 503 (7th Cir. 1980); *First Lakewood Associates v. NLRB*, 582 F.2d 416 (7th Cir. 1978); *Peerless of America, Inc. v. NLRB*, 484 F.2d 1108 (7th Cir. 1973).

The Third, Fifth and Eighth Circuits join the decision of the *en banc* majority below in advocating a third theory of review. Those circuits give greater deference to Board decisions in "Category II" cases than the other circuits by not requiring any explanation whatsoever to support its *Gissel* conclusions.

For example, in *NLRB v. Keystone Pretzel Bakery, Inc.*, 696 F.2d 257 (3d Cir. 1982), the court enforced the Board's bargaining order even though the Board's written decision merely listed the employer's unfair labor practices and recited, by rote, the conclusions which *Gissel* requires. *See also NLRB v. Eastern Steel Co.*, 671 F.2d 104 (3d Cir. 1982); *NLRB v. Permanent Label Corp.*, 657 F.2d 512 (3d Cir. 1981). Similarly, the Fifth Circuit in *NLRB v. Dadco Fashions, Inc.*, 632 F.2d 493 (5th Cir. 1980), enforced the issuance of a bargaining order despite "[t]he generality of the Board's findings" because the "record substantially support[ed] the Board's conclusions." *Id.* at 498. *See also Chromalloy American Corp. v. NLRB*, 620 F.2d 1120 (5th Cir. 1980); *but see NLRB v. American Cable Systems, Inc.*, 427 F.2d 446 (5th Cir.), *cert. denied*, 400 U.S. 957 (1970). The Eighth Circuit, in *NLRB v. Ely's Foods Inc.*, 656 F.2d 290 (8th Cir. 1981), supported its decision to enforce a bargaining order by recalling the *Gissel* Court's admonition that employees may always disavow a union by filing a representation petition. *See also NLRB v. Suburban Ford, Inc.*, 646 F.2d 1244 (8th Cir. 1981).[10]

Thus, a conflict among the circuits exists with respect to the specificity with which the Board must justify its issuance of a "Category II" bargaining order. Because of the conflict, the importance of having a uniform standard of review in the circuit courts and the severity of the bargaining order remedy, this Court's review of the Fourth Circuit's *en banc* decision is warranted.

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[10] Another recent decision of the Eighth Circuit, however, is not in agreement. In *Patsy Bee, Inc. v. NLRB*, 654 F.2d 515 (8th Cir. 1981), decided by a different panel just nine days before *Ely's Foods*, the court refused to enforce the bargaining order because the Board's "conclusory statement" supporting the issuance of the order did not sufficiently explain why the Board's less severe remedies would not have sufficed to ensure a fair and free election.

CONCLUSION

For the reasons herein expressed, petitioner, Maidsville Coal Company, Inc., respectfully requests the Court to grant this petition for a writ of certiorari.

Respectfully submitted,

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TABLE OF CONTENTS

Page

En Banc opinion of the United States Court of Appeals for the Fourth Circuit in *National Labor Relations Board v. Maidsville Coal Company, Inc.*—April 12, 1983 ..... A1

Panel opinion of the United States Court of Appeals for the Fourth Circuit in *National Labor Relations Board v. Maidsville Coal Company, Inc.*—June 11, 1982 ..... A6

Affidavit of John Petitte A27

Decision and Order of the National Labor Relations Board in *Maidsville Coal Co., Inc. and United Mine Workers of America, District 31* A29

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 81-2155

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

MAIDSVILLE COAL COMPANY, INC.,
Respondent.

UNITED MINE WORKERS OF AMERICA, DISTRICT 31,
Amicus Curiae.

On Petition for Enforcement of an Order
of the National Labor Relations Board

Argued: April 12, 1983 Decided: October 5, 1983

Before WINTER, Chief Judge, RUSSELL, WIDENER, HALL, PHILLIPS, MURNAGHAN, SPROUSE, ERVIN and CHAPMAN, Circuit Judges, and BRYAN, Senior Circuit Judge.

David S. Fishback (William A. Lubbers, General Counsel, John E. Higgins, Jr., Deputy General Counsel, Robert E. Allen, Associate General Counsel, Elliott Moore, Deputy Associate General Counsel on brief) for Petitioner; Robert M. Steptoe, Jr. (C. David Morrison on brief)

for Respondent; (Kenneth J. Yablonski, Lawrence R. Chaban, Yablonski, King, Costello & Leckie on brief) as Amicus Curiae.

SPROUSE, Circuit Judge:

This is an application by the National Labor Relations Board for enforcement of an order which it issued against Maidsville Coal Company on September 1, 1981. The Board found that Maidsville's pervasive unfair labor practices made it impossible to reasonably insure the holding of a fair election, and that a bargaining order was necessary to protect the majority sentiment expressed through authorization cards. Its order directed Maidsville to recognize and bargain with the United Mine Workers of America—a "Gissel" [1] order. 257 N.L.R.B. 1106 (1981).

A divided panel of this court denied enforcement of the Board's order, due to the majority's perception that the Board had not advanced "specific, detailed reasons upholding its conclusions that an election will not adequately reflect employee preferences and that traditional remedies . . . are unlikely to erase any hint of coercion occasioned by the employer's unfair labor practices." *NLRB v. Maidsville Coal Co.*, 693 F.2d 1119, 1122 (4th Cir. 1982). After an *en banc* hearing, we now grant enforcement.

The panel majority and dissent agreed that there was sufficient evidence to support the Board's finding that the union had achieved a card majority. There was likewise no dispute as to the evidence concerning the events which the Board found to comprise pervasive and extensive unfair labor practices. Those events are recited in detail in the panel dissenting opinion,[2] and summarized in the Board's opinion as follows:

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[1] *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

[2] 693 F.2d at 1124-29.

> [T]he evidence establishes that, at the outset of the employees' union organizational activities, the Employer commenced a campaign designed to undermine and erode the Union's majority support among its employees by discharging four identified union supporters on the sole basis of these employees' union sentiments. At the same time, the Employer violated the Act by interrogating employees concerning their union activities and sentiments; by granting wage increases; by making various promises of improved working conditions and benefits in order to dissuade employees from supporting the Union; and by threatening employees with discharge, layoff, and other reprisals, including the cessation or reduction of operations, if they continued to engage in activities on behalf of the Union. Thereafter, the Employer enlisted the aid of a third party to threaten an employee with physical harm if he continued to support the Union.

257 N.L.R.B. at 1106 n.1.

Maidsville argued a number of points before the original panel, but we easily agree with the Board that the employees had given the Union a card majority and with its findings of employer unfair labor practices. The only issue remaining is whether the Board was correct in issuing the *Gissel* bargaining order.

The Supreme Court in *Gissell* [sic] discussed varying factual circumstances with which the Board might be faced when deciding to issue a bargaining order *vel non* without requiring an election. The first set of circumstances consists of "exceptional" cases marked by "outrageous" and "pervasive" unfair labor practices of "such a nature that their coercive effects cannot be eliminated by the application of traditional remedies, with the result that a fair and reliable election cannot be had." *Gissel Packing Co.*, 395 U.S. at 613-14. In this category of cases,

a bargaining order may issue even though the Union may not be able to prove that it ever had a majority status among employees. A second set of circumstances consists of "less extraordinary cases marked by less pervasive practices." *Id.* at 614. In this category of cases, if the Union at one point during the campaign held a card majority, a bargaining order should issue when:

> [T]he Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order.
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> . . .

Id. at 614-15; *see also id.* at 612 n.32. A third category of cases identified by the Court consists of "minor or less extensive unfair labor practices, which, because of their minimal impact in the election machinery, will not sustain a bargaining order." *Id.* at 615.

The Board in this case, finding that the Union had achieved a card majority, issued the disputed bargaining order on the rationale of the second *Gissel* category. Maidsville argues, however, that the Board's summary of unfair labor practices, quoted *supra*, and stated reasons, quoted *infra*, for issuing the bargaining order are not sufficiently specific and detailed to satisfy the requirements of *Gissel* and of this court in *NLRB v. Appletree Chevrolet, Inc.*, 608 F.2d 988 (4th Cir. 1979) and *NLRB v. Apple Tree Chevrolet, Inc.*, 671 F.2d 838 (4th Cir. 1982). Maidsville misconstrues the purpose of our requiring specificity in the Board's findings and reasoning. The principal purpose is to facilitate an informed review. In reviewing "Gissel" bargaining orders, it is particularly important that we understand not only the underlying facts, but also the Board's rationale in applying the *Gissel* standards to those facts. Chief Judge Winter, in a recent opinion, succinctly stated this re-

quirement: "To facilitate review under those standards, the Board must support a *Gissel* order by a statement of reasons stating what unfair labor practices the order is intended to redress and indicating in general why traditional remedies are inadequate in the circumstances." *Standard-Coosa-Thatcher Carpet Yarn Division, Inc. v. NLRB*, 691 F.2d 1133, 1144 (4th Cir. 1982).

The Board here summarized chronologically numerous egregious unfair labor practices committed by Maidsville throughout the organization campaign. It then stated its reasons for issuing the bargaining order:

> Under these circumstances, including the small size of the employee complement in question and the substantial percentage of the work force subjected to the Employer's unlawful terminations and other unfair labor practices, we find that a bargaining order is necessary and appropriate in order to protect the majority sentiment expressed through the authorization cards and to otherwise remedy the violations committed.

257 N.L.R.B. at 1106 n.1.

The Board's order articulates its findings and reasons in support of its bargaining order with sufficient specificity and detail to permit an informed review, and thus Maidsville's procedural challenge must fail. *Standard-Coosa-Thatcher*, 691 F.2d at 1144.

ENFORCEMENT GRANTED

Judges Russell, Widener, Chapman and Bryan respectfully dissent. They would deny enforcement and remand to the Board for more detailed findings as expressed in the opinion of the original panel majority.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 81-2155

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

MAIDSVILLE COAL COMPANY, INC.,
Respondent.

On Petition for Enforcement of an Order
of the National Labor Relations Board

Argued: June 11, 1982 Decided: November 15, 1982

Before BRYAN, Senior Circuit Judge, SPROUSE and CHAPMAN, Circuit Judges.

David S. Fishback (William A. Lubbers, General Counsel, John E. Higgins, Jr., Deputy General Counsel, Robert E. Allen, Associate General Counsel, Elliott Moore, Deputy Associate General Counsel on brief) for Petitioner; Robert M. Steptoe, Jr. (C. David Morrison on brief) for Respondent; (Kenneth J. Yablonski, Lawrence R. Chaban, Yablonski, King, Costello & Leckie on brief) for Amicus Curiae.

BRYAN, Senior Circuit Judge:

Adjudging respondent employer guilty of abridging the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* (1976), in multiple respects, the National Labor Relations Board (Board or NLRB) now prays this Court to enforce the Board's Order of September 1, 1981, requiring, *inter alia*, Maidsville Coal Company, the employer, to bargain with the United Mine Workers of America (Mine Workers). For the reasons which follow, we decline enforcement and remand the cause to the Board for further proceedings consistent with this opinion.

I

In April 1979, the Mine Workers began an organizing campaign at the employer's tipple in Maidsville, West Virginia. Representatives of the union circulated authorization cards to production and maintenance employees and, by April 11, the signatures of five employees had been obtained. Afterwards, this number was found by the Administrative Law Judge, as well as the Board, to constitute a majority. Formal demand for recognition by the Mine Workers was made April 19.

According to the ALJ's findings, confirmed by the NLRB, the employer ran afoul of the Act's strictures on several occasions during the organizational campaign. First, it gave all of its employees salary increases during the campaign, in violation of § 8(a)(1) of the Act. Second, on April 13 it wrongfully terminated four employees upon suspicion that they were active in the union effort. This disregard of § 8(a)(3) was mitigated ten days later by the employer voluntarily rehiring and paying back wages to each of the four workers. Third, the employer was found to have constructively discharged Richard Heller, the tipple's weighmaster, nearly a month afterwards, on May 21, 1979. There were sundry other

violations of § 8(a)(1) found by the ALJ [1] as well as a violation of § 8(a)(5) on account of the employer's refusal to bargain with the Mine Workers.

Between April 19, when the employer's president said he first learned he could not fire employees for union activity, and April 23, the employer sought to appease the employees by a) rehiring with full back pay the fired workers, b) obtaining from employees a list of grievances, and c) scheduling a meeting with all employees for April 23. At this meeting, the president stated that he could not discuss bargaining in light of the Mine Workers' action in demanding recognition and in filing the first of several unfair labor practice charges. Discharged employee, Heller, asked the management representatives to leave the room so the employees could discuss the situation among themselves. At this point, Heller apprised his colleagues of conversations with the president and indicated that the latter had offered to rectify all their complaints [2] if the union was rejected. Five employees, including one—Kenneth Roberson—who had earlier signed a union authorization card, agreed to this resolve and thereupon signed a notarized statement to such effect. The four employees who were dismissed on April 13, however, declined to accede to this agreement. In any event, the employer apparently assented to the conditions and nothing further was done by the employees relating to the union.

The union, of course, continued to press its contention that the employer's conduct throughout the ill-fated organizational campaign contravened the Act. The ALJ saw the employer as offending § 8(a)(1) by unlawfully

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[1] Included among these infractions were unlawful interrogations of employees about their union activities and sympathies, and threats of discharge or reprisal.

[2] The grievances included a demand that James Casino be removed as supervisor, that all fired employees be rehired with back pay, that a retirement plan be devised, and that wages be increased.

interrogating employees and by threats of discharge and reprisals, of § 8(a)(3) by illegally firing the four employees on April 13, and later effectively discharging Heller, and of § 8(a)(5) by refusing to bargain with the union on and after April 19.

Besides requiring Maidsville to refrain from violating the Act, rehire the fired workers with back pay and other employment rights, and acknowledge its transgressions through the posting of the usual notice, the ALJ recommended and the Board ordered the employer to bargain with the Mine Workers. This portion of the decision was grounded on the finding of a card majority prior to the commission of the unfair labor practices and the conclusion that a fair election could not be obtained in the future.

Enforcement of this Order is now sought. Employer resists, principally protesting that the union never had a card majority because a) Heller was improperly counted as an employee and b) one Jeffrey Freeman was mistakenly classified as a supervisor. Further, the employer contends that the Board's decision that unlawful across-the-board wage increases were granted is not substantiated by the evidence and, also, that neither the ALJ nor the Board made sufficiently detailed findings of fact to authorize a bargaining order.

II

In *NLRB v. Gissel Packing Co.*, 395 U.S. 515 (1969), the Court identified three situations where consideration might be given to the appropriateness of a bargaining order. First, it may be suitable where the employer is adjudged to have committed "outrageous" or "pervasive" unfair labor practices, regardless of whether the union ever has garnered majority sentiment. Infractions of this degree are of "such a nature that their coercive effects cannot be eliminated by the application of traditional remedies with the result that a fair and reliable election cannot be had." *Id.* at 614, *quoting NLRB v. Logan*

Packing Co., 386 F.2d 562, 570 (4th Cir. 1967). Second, the Court opined that a bargaining order could be issued by the Board to remedy less outrageous instances of employer misconduct which still tend to subvert the election process. In determining whether, in its discretion, the Board should issue an order in this setting, the Supreme Court instructed the Board to give thought to whether the union once had a card majority which apparently had been dissipated by the unfair labor practices, the extensiveness of past employer misconduct, their effect on election conditions, and the likelihood of their recurrence in the future. 395 U.S. at 614. Finally, the Court remarked that there was yet a third category of incidents marked by minor, relatively insignificant disobedience. Noting that these trifling faults had an insubstantial effect on elections, the primary mechanism for evaluating employee support for a proposed collective bargaining agent, the Court held that orders to bargain in this context would be impermissible.

The Board now insists that the bargaining order is justifiable as a remedy imposed, pursuant to the sound exercise of the agency's discretion, for the second category of unfair labor practices. Insisting that the record, taken as a whole, supplies substantial evidence for this decision, the NLRB demands enforcement.

The employer resists, first by seeking to undercut the essential predicate for a *Gissel* bargaining order in the so-called category II case. It maintains that the Mine Workers actually never had a card majority because Jeff Freeman was an "employee" and not a "supervisor" and/or because Richard Heller was a "supervisor" and not an "employee." Nevertheless, we believe the Board's resolution of these factual matters is underpinned, however, by sufficient evidence. Thus we decline to disturb them.[3]

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[3] Similarly, the employer's challenge to the NLRB's finding that across-the-board wage increases were granted, in violation of

As another ground for relief, the employer maintains that the Board's bargaining order is defective because its promulgation does not meet the prerequisites of this Circuit expounded in *NLRB v. Appletree Chevrolet, Inc.*, 608 F.2d 988 (4th Cir. 1979). There, we said the Board must advance specific, detailed reasons upholding its conclusions that an election will not adequately reflect employee preferences and that traditional remedies (e.g., cease and desist orders) are unlikely to erase any hint of coercion occasioned by the employer's unfair labor practices. We agree with the employer.

In *Appletree Chevrolet*, the Board's petition for enforcement was not allowed when review of its proceedings made plain that the Board did little more than cite *Gissel* as the basis for its bargaining order. Writing for this Court, Judge Russell commented that "[b]oth [the ALJ and the Board] seem to have proceeded upon the erroneous assumption that a finding of unfair labor practices automatically engendered a coercive atmosphere that would support a bargaining order." *Id.* at 1000. He observed that in making specific findings, "the Board must . . . 'assess the possibility of holding a fair election in terms of any continuing effect of misconduct, and the potential effectiveness of ordinary remedies,' [and] should consider whether the respondent's conduct has dissipated the Union's majority and whether the employer is likely to 'ignore the Board's cease and desist order.' " *Id.* (footnotes omitted)

Review of the ALJ's Findings and Conclusions here, as well as the Board's Decision, reveals a failure, com-

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§ 8(a)(1), must fail. While the employer may be able to point to probative evidence which, if believed, could sustain its position, the Board is equally capable of defending its judgment through reference to the record. Under these circumstances, the Act, *see* 29 U.S.C. § 160(e) (1976), clearly requires this Court to give credence to the Board's findings.

parable to that identified in *Appletree Chevrolet*, to make the specific findings mandated by both *Gissel* and *Appletree Chevrolet*. In the ALJ's 77-page decision, the only "findings" relevant to the issuance of a bargaining order are contained in a conclusory footnote.[4] Such talismanic invocations, of course, are insufficient in this Court to sustain a bargaining order.

Perhaps mindful of this fact, the Board, in confirming the ALJ's recommended decision, made a belated attempt to comply with our exactions. Regrettably, its attempt shares all the deficiencies of the ALJ's decision. Rather than actually analyzing the facts with a view toward determining whether a fair election could be had, the Board recites, without more, the Court's explanation of what kind of showing is necessary for the issuance of a bargaining order. This is not enough.

With apparently necessary repetition, we reiterate that elections are the preferred measure of employee sentiment under the Act. Still, there are cases where it is not possible to hold a fair election. But before a bargaining order may issue, the Board must demonstrate, with particularity, why traditional remedies probably will not protect employees' rights under § 7 of the Act. Since it has not here done so, enforcement is disallowed and re-

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[4] The ALJ wrote:

> I specifically conclude and find the unfair labor practices committed by Employer were so pervasive and extensive that the possibility of erasing their effects on the employees and ensuring a fair election by the use of traditional remedies is slight. With employees being so conditioned, I find that in this case, employee sentiment, as expressed by the authorization cards is best protected by a bargaining order. NLRB v. Gissel Packing Co., Inc., 395 U.S. 575 (1969); Staats and Staats, Inc., 254 NLRB No. 105 (1981).

Appendix at 72.

mand is ordered for reconsideration in light of *Appletree Chevrolet.*[5]

III

Prior to the argument of this appeal, the employer moved to supplement the record on appeal with its president's affidavit. The affiant made known that the composition of the employer's workforce has changed dramatically since the alleged infractions in 1979. The point of this submission is to persuade us that whatever the merits of a bargaining order in 1979, circumstances have changed so radically and undeniably that it would be ill-advised to uphold the Board's decree today.

With one Judge dissenting, we tentatively granted the employer's motion to supplement, but left to the Board the opportunity to challenge this addition at oral argument. The Board instantly opposed such an informative endeavor. Instead it mechanically insisted that it had properly considered the relevant evidence and that its decision should be reviewed by this Court only on the basis of the record evidence available to the Board.

The Board, of course, is correct in averring that an appellate court, with very rare exceptions, must confine its review to that which comprised the record in the trial court or administrative agency. Therefore, we do not now pass upon the evidence now made known by the employer. Since a remand is necessary, however, and to save the parties from the probability of a duplication of this litigation, we think that the employer's affidavit ought to be countenanced by the Board, together with such other evidence as the parties may present concern-

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[5] In conducting this inquiry, we further admonish the Board to consider our additional comments on the necessary analysis in *Appletree II. See* NLRB v. Appletree Chevrolet, Inc., 671 F.2d 838 (1982).

ing the issuance of a bargaining order. *See* 29 U.S.C. § 160(e) (1976).[6]

The petition for enforcement is denied and the cause is remanded to the National Labor Relations Board for further proceedings consistent with this opinion.

It Is So Ordered.

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[6] In pertinent part, this provision states that upon a proper showing, we "may order . . . additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record."

SPROUSE, Circuit Judge, Dissenting:

I respectfully dissent.

I agree with the majority that substantial evidence requires affirmance of the Board's findings of unfair labor practices, that Freeman was a supervisor, and that Heller was an employee and appropriately counted as a member of the bargaining unit. The reason for the majority's decision to deny enforcement and to remand is its conclusion that the Board did not sufficiently articulate its reasons for issuing an order to bargain. In my view the expression of the Board's reasoning more than satisfies the *Appletree* standard of particularity, and the bargaining order should be enforced.

In *Appletree I*, Judge Russell correctly observed: "It is only because the misconduct of the employer has so dissipated the union majority that a fair expression of employee sentiment, uncoerced by the employer's improper conduct, cannot be secured by the traditional procedure that, in this second class of cases, a bargaining order may issue." *N.L.R.B. v. Appletree Chevrolet, Inc.*, 608 F.2d 988, 996 (4th Cir. 1979).

The court in *Appletree I* refused to enforce the portion of the Board's order requiring bargaining because the court felt that the Board failed . . . "to make anything more than the most cursory findings on the impact of the 8(a)(1) violations on the possibility of a fair election . . . ." and that the Board had ". . . proceeded upon the erroneous assumption that a finding of unfair labor practices automatically engendered a coercive atmosphere that would support a bargaining order." *Id.* at 1000.

In its opinion, in the case *sub judice*, the Board explained:

> [T]he evidence establishes that, at the outset of its employees' union organizational activities, the Employer commenced a campaign designed to undermine

> and erode the Union's majority support among its employees by discharging four identified union supporters on the sole basis of these employees' union sentiments. At the same time, the Employer violated the Act by interrogating employees concerning their union activities and sentiments; by granting wage increases; by making various promises of improved working conditions and benefits in order to dissuade employees from supporting the Union; and by threatening employees with discharge, layoff, and other reprisals, including the cessation or reduction of operations, if they continued to engage in activities on behalf or the Union. Thereafter, the Employer enlisted the aid of a third party to threaten an employee with physical harm if he continued to support the Union.
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> Under these circumstances, including the small size of the employee complement in question and the substantial percentage of the work force subjected to the Employer's unlawful terminations and other unfair labor practices, we find that a bargaining order is necessary and appropriate in order to protect the majority sentiment expressed through the authorization cards and to otherwise remedy the violations committed.

How could the Board, attempting to comply with *Appletree*, more completely explain the Board's view of the evidence as supporting a conclusion that the misconduct of the employer has so dissipated the union majority that a fair expression of employee sentiment, uncoerced by the employer's improper conduct, could not be secured by the traditional procedures? The simple answer is that the Board could not. The Board's opinion fully satisfied *Appletree*'s articulation standard—fully summarized the evidence and displayed the Board's reasoning supporting its conclusion that an election would likely be tainted by the unfair practices.

Moreover, the foregoing summary and statement of reasoning were not deprived or expressed in a vacuum. The Board had adopted the ALJ's findings of fact (detailed hereafter). These facts so clearly depict the nature and effect of the unfair practices that requiring summarization by the ALJ or the Board in fact adds very little. Since, however, we are to compel a summary by the Board of its view of the evidence, that requirement should be reasonably flexible in a case such as this, where a detailed compilation of facts found at trial renders the application of legal principles to those facts a simple task. The evidence here speaks so loudly of pervasive and egregious unfair labor practices, that our rule requiring the factfinder to restate its understanding of the evidence should not force the Board to redundancy, in a case where all the substantive *Gissell* [sic] criteria are obviously satisfied.[1]

Particularly illustrative of the egregious violations in this case was an incident involving the employer's threat of physical harm to an employee. The employee, Richard Heller, had on repeated occasions been verbally harassed about his pro-union sentiments by the employer, to the point of physical illness. Heller was working in the scalehouse with a person from a coal testing lab when he saw his employer, John Petitte, outside talking with

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[1] *See, e.g. Multi-Medical Convalescent and Nursing Center v. NLRB*, 550 F.2d 974 (4th Cir.), *cert. denied*, 434 U.S. 935 (1977), (where a bargaining order in response to less egregious and pervasive unfair labor practices than are present here was approved): "It is clear that where practices have been engaged in that 'have the *tendency* to undermine majority strength and impede the election process' the Board has authority to issue a bargaining order." *Id.* at 976, *quoting NLRB v. Gissel Packing Co.*, 395 U.S. 575, 614 (1969). Moreover, " 'If the Board finds that the possibility of *erasing* the effects of past practices and of *ensuring* a fair election . . . is slight and that employee sentiment once expressed through cards would, *on balance*, be *better* protected by a bargaining order, then such an order should issue.' " *Multi-Medical* at 976, *quoting Gissell* [sic] at 614-15. (emphasis added).

two men he did not know. One of those men—who was about six feet tall, 250 pounds, with "great big arms and a great big neck, like a football player"—then came into the scalehouse, locked the door behind him, walked up to Heller, pointed his finger in Heller's face, and said, "What's this I heard about a labor problem down here?" Heller backed into a corner and replied that he did not know what the stranger was talking about. Nevertheless, the man kept shaking his finger in Heller's face and said, "I'm going to tell you something, I don't want to hear no more about a labor problem down here. The Petittes don't want a union down here, so I better not hear no more about it." The man then pointed to the lab worker and said that also went for him. Heller said that the lab worker was from another company and not involved. At that point, the company President, John Petitte, knocked on the door and was let it. Petitte asked what the matter was and told Heller, "You look like you seen a ghost." Heller replied, "I don't appreciate what you just had this guy do to me." Petitte answered, "I was just razzing you a little bit, joking around with you." Petitte told Heller not to let it get to him.

This incident occurred at the end of a two-month period during which scarcely a day passed without illegal employer harassment, promises, bribes, threats, interrogation and discharges. The following chronological review of the events of that month, as found by the ALJ and expressed by the Board, illustrates the inutility of requiring the Board to explain at greater length its reasoning.

In May, 1979, United Mine Workers of America (hereinafter "Union") organizer Bonnett contacted Company supervisor Freeman and asked Freeman to give him the names and addresses of the Company's employees. Freeman did not provide Bonnett with such a list, but Bonnett and Morris, another Union organizer, proceeded by visiting and talking to employees at their homes, at bars,

and at churches. In the course of their efforts, they reached all nine of the Company's production and maintenance employees and received favorable responses from six of them.

In late March, supervisor Freeman asked employee Trippitt if he had signed a Union card. When Trippitt replied that he had not, Freeman said that there would be no union, because the Petittes would run the place themselves to avoid it. Sometime in early April, prior to April 9, Freeman told employee Bowman that he had informed Superintendent Guseman that a Union organizer was talking to the men.

On April 4, Guseman granted hourly wage increases of 50 cents to Freeman and employee Roberson, and 25 cents to employee Tennant. These raises were to be effective April 4. On April 9, Bowman signed a union authorization card. Trippitt, Roberson, Heller, and Eddy signed Union authorization cards on April 10.

During the afternoon shift on April 10, John Petitte (president of the company, hereinafter "Petite" [sic]) informed Bowman and Trippitt that they were being granted a 50-cent per-hour wage increase, to be effective April 18. Late that night, Freeman told Bowman and Trippitt that they should forget about the Union and that the Petittes would run the operation themselves rather than deal with the Union.

The next day April 11, Petitte informed employee Eddy that he was being granted a 25-cent per-hour wage increase, to be effective April 18, and that, if things went well, Eddy would receive another raise in six to eight months. Similar raises were also given to employees Ingersoll, Elliott, and Fain.

On April 12, Petitte approached Bowman while at work and asked him if Union organizer Morris had been to his home. When Bowman said, "Yes," Pettite asked

him what he had told Morris. Bowman replied that he had told Morris to "get the hell out of my house." Petitte then told Bowman that he would get another raise in the summer if work picked up. In the course of this discussion, Petitte also told Bowman that he could not afford the Union and that, if it came in, he would just lay off the workers and run the place himself. Finally, Petitte told Bowman to keep his father away from the Company because he believed that the Union mine where Bowman's father worked was the source of the Company's Union problem.

On April 12, Freeman informed company vice-president Jasper Petitte that Bowman had signed a Union card. John and Jasper Petitte then discussed the Union situation, and that afternoon (April 12), the Company decided to terminate the four employees it believed to be Union adherents—Bowman, Trippitt, Eddy, and Heller—this to forestall unionization. The four were immediately notified of their termination.

On Tuesday, April 19, Union representative Morris and Bonnett came to Petitte's office and requested recognition of and bargaining with the Union as the majority representative of the Company's production and maintenance employees; Petitte declined. Later that day, Petitte called his lawyer, who told Petitte that while he did not have to recognize the Union, the discharge of the four men was unlawful and that they should be hired back to avoid extensive backpay liability.

On Friday morning, April 20, Petitte drove to Heller's home, where he found both Heller and Eddy. After telling Heller and Eddy, "I don't know what I'm going to do with you guys," Petitte offered them reinstatement. Petitte further said he would pay them $8.00 per hour if they came back to work. Heller asserted that most of the employees felt that the foreman, Casino, should be relieved and mentioned other grievances; Eddy said that

the Company ought to have a retirement plan. Petitte wrote these items down, but stated that he could not afford the Union and that, if the Union came in, he would cut back the workforce and would probably lay off both Heller and Eddy. On the other hand, Petitte said he would get working on a pension plan right away and would grant a pay increase, vacation pay, and paid holidays as soon as the Union was voted out. Finally, Petitte asked Heller to serve as spokesman for the employees; Heller agreed. Heller and Eddy agreed to return to work on Monday.

The next day, Saturday, April 21, Petitte again visited Heller's home. This time he reported on the progress he had made in setting up a retirement system and told Heller there would be a meeting at 3:00 p.m. Monday, to discuss retirement and the other proposals made the day before.

On Sunday, April 22, Petitte sought out Charles Lazzell, a Petitte family friend and neighbor. Petitte told Lazzell what had happened. Lazzell suggested that Petitte contact an attorney specializing in labor problems and further told Petitte that he could not fire anyone for Union activities and that he should not get involved in direct negotiation with the employees.

The next morning, April 23, Freeman, pursuant to Petitte's direction, contacted Bowman and asked him to return to work. Freeman stated that the men should forget about the Union and that raises were in the offing.

On April 23, following a conference with Lazzell, Petitte informed Heller that, due to legal constraints, Petitte could not bargain about the April 20 proposals with the men and that he could not promise anything to them. Heller asked if he could meet with the men. Lazzell, speaking for the Company at this point, said that would be permissible. Heller then asked if the employees could discuss the proposals among themselves and then

present them to Petitte for him to "agree to it or not." Lazzell, not knowing whether this would be a legally permissible course of action for the Company, told Heller that if he brought it up, the Company would respond at that time.

Heller, Eddy, Trippitt, and Bowman met at Bowman's home that afternoon to discuss their position and then returned to the plant for the scheduled 3:00 p.m. meeting. Just before the meeting began, however, Heller was informed by Petitte that he had just discovered that he could not lawfully grant any proposal coming from the employees because he was prohibited from dealing with them directly on such matters.

The meeting was attended by Petitte, Guseman, Freeman, Lazzell, and all the non-office employees except Elliott, who was absent that day. Petitte began the meeting by introducing Lazzell, who explained that because of a representation election petition filed with the National Labor Relations Board, the Company could not negotiate with, or make promises to, the employees because such promises would be "illegal." Heller asked if the employees could have a meeting; Lazzell said they could, but managemnt would have to leave. Heller asked the management representatives to leave and, except for Freeman, they did.

Heller then presented proposals that Petitte had earlier agreed to if the employees did not bring in the Union. Next, he read a list of proposals that the employees should present to the Company. At that point, Freeman suggested that they vote on the list; they did so, and all voted in favor. Freeman then brought in the company secretary, who was also a notary public, and had her type and notarize a document which stated that the employees had voted unanimously in favor of the proposals. Then Freeman told the employees that they would vote on the Union and that, if the Union was voted out, the pro-

posals would go into effect that day. Heller resisted, stating that any such decision should be made at the election. Freeman pressed the point and called for a vote by a show of hands to see who wanted the Union out. Five voted to dispense with the Union. The four remaining employees present—Heller, Eddy, Bowman, and Trippitt—abstained on the ground that this was not the proper way to resolve the issue. Freeman again brought in the secretary, who prepared a notarized document, which was signed by the five who voted against the Union. After the meeting ended, the two notarized documents were given to Petitte, and the four recalled employees received checks to cover backpay.

The next day, April 24, Petitte came by the scalehouse and asked Heller how the men now felt about the Union, since the Company could not grant the proposals because of the Union. Heller said he was not sure.

The following day, Wednesday, April 25, Petitte came by the scalehouse and asked Heller how he was doing. Heller answered that he was not doing well, because he was nervous about the Union situation. Petitte asked how the employees felt about the Union; Heller said that he did not know—that he was not sure. Petitte then asked if Heller thought the employees would vote the Union in or out; Heller again answered that he did not know—that he was not sure. Heller then told Petitte he was sick and asked to go home. Petitte told him to wait and went to get Lazzell. Lazzell came into the scalehouse and told Heller he could leave. Heller said he would let them know how he felt on Friday, and stated, in response to a question, that he was not quitting.

Heller contacted Petitte on Friday, April 27, and told Petitte that he had gone to see a doctor, who told him that "his nerves and his job were getting to him" and that he should take two weeks off. Heller consequently

requested two weeks off, which Petitte granted, without pay.

Heller returned to work several days later, on Wednesday, May 2. That morning, Petitte came by the scalehouse and told Heller that he was mad because every time he talked to employees about the Union, "outsiders" would find out and he would get in more trouble. Petitte also complained that every time he asked employees if they were talking with anyone about the Union, they would not give an answer. Thereafter, Petitte asked Heller almost every day what the men thought about the Union and whether they were going to vote it in or out. Petitte also repeatedly told Heller that he could not afford the Union and that, if the Union came in, many employees would lose their jobs. When Heller complained to Petitte that this continuing questioning about the Union made him nervous, Petitte's response was that the Union also upset him.

Around May 3, Heller became so ill in the scalehouse that he had to go to the restroom. Later that day, Heller telephoned Petitte and told him he wished to quit. Petitte resisted and asked Heller to come to the office. Heller did so and told Petitte that the greatest cause of his upset was the continued interrogation about the Union.

Heller returned to work on Friday, May 4. Beginning Monday, May 7, Petitte approached Heller each day and told him that the Company could not afford the Union and that, if the Union came in, he would probably lose his job. This went on all week. During the week of Monday, May 14, Petitte came to Heller and asked him if the men had changed their minds about the Union and if Heller knew how they were going to vote. Heller got "nervous every time [he saw Petitte] coming." On Thursday, May 17, Heller was physically threatened as hereinbefore described.

Considering the foregoing facts, is it any way unclear why and how the Board concluded that the unfair labor practices were so serious and pervasive that they would probably affect an election? We must remember that the underpinning of *Gissell* [sic] and *Appletree* is the importance of an assessment by the Board of the immediate and residual coercive effects of the unfair practices, in order to determine the likelihood that an election would be affected by the unfair labor practices. 395 U.S. at 879; 608 F.2d at 1000. The question of whether or not an election would likely be affected by unfair labor practices ultimately must turn on the circumstances of the unit and the nature of the unfair labor practices, which factors in this case were clearly presented with great particularity, and evaluated by the Board. Thus, the *Appletree* standard is satisfied.

There is a final point on which I differ from my panel colleagues. Two weeks prior to oral argument on this appeal, Maidsville moved to supplement the appellate record with its president's affidavit relating information concerning the then current composition of its work force. This information had not been developed during the hearings. The majority opinion states that the motion was "tentatively" granted. I believe this to be an unwarranted practice. Regardless of how the procedure is characterized, the majority effectively considered the information and has ordered the Board to consider it on remand. Approving this procedure could well expand the appellate process to include interminable affidavits bearing information tardily conceived as relevant by parties to the litigation. This has been universally disapproved. *See L'Eggs Products, Inc. v. NLRB*, 619 F.2d 1337, 1353 (9th Cir. 1980); *J. P. Stevens & Co., Inc. v. NLRB*, 441 F.2d 514, 525 n.16 (5th Cir. 1971), *cert. denied*, 404 U.S. 830; *NLRB v. L. B. Foster Co.*, 418 F.2d 1 (9th Cir. 1969); *cert. denied*, 397 U.S. 990; *General Steel Products, Inc. v. NLRB*, 445 F.2d 1350, 1361 (4th Cir. 1971) (Winter, J.,

dissenting). The majority recognizes "that an appellate court, with rare exceptions, must confine its review to that which comprised the record in the trial court or administrative agency." The majority has not, however, demonstrated a "rarity" in this case calling for an exception, and this decision provides no guidance to the characteristics of such a "rarity."

"MOTION EXHIBIT A"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Record No. 81-2155

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

MAIDSVILLE COAL COMPANY, INC.,
Respondent.

AFFIDAVIT

STATE OF WEST VIRGINIA,
COUNTY OF HARRISON, TO-WIT:

John Petitte, being first duly sworn, deposes and says:

(1) That he is the President of respondent Maidsville Coal Company, Inc., and is the same John Petitte who testified before Administrative Law Judge Robert G. Romano in the above-styled action on December 6 and 7, 1979;

(2) That as of May 1, 1982, the employees of Maidsville Coal Company, Inc., the shift worked, and their respective job classifications were as follows:

Employee	Shift	Job Classification
Robert Bayles	afternoon	general yard man
David Boggs	day	machine operator
Earl Bowman	day	barge operator
Russell Byrd	afternoon	general yard man
Frank Casino	day	machine operator
James Casino	day	machine operator

Employee	Shift	Job Classification
William Elliott	day	machine operator
William Graham	afternoon	general yard man
William Harman	day	sludge truck driver
Dennis Ingersol	day	plant operator
Randall McDonald	afternoon	machine operator
Nick Myers	day	machine operator
Levi Radabaugh	day	general yard man
Kenneth Roberson	afternoon	plant operator
Roger Rodeheaver	day	drill operator
Nikki Roggish	day	weighmaster
Roger Roggish	afternoon	weighmaster
James Thomas	day	general yard man and rail operator
Charles Trippitt	afternoon	machine operator;

(3) That only seven of the employees above listed were employed by Maidsville Coal Company, Inc. on April 19, 1979, the effective date of the bargaining order issued by the National Labor Relations Board, two of which (James Casino and Nikki Roggish) were not at that time to have been included in the bargaining unit;

(4) That since April 19, 1979, at which time the proposed bargaining unit consisted of ten employees, the employee complement for that unit has increased by 90% to nineteen employees.

/s/ John Petitte
JOHN PETITTE

Taken, subscribed and sworn before me this 6th day of May, 1982.

My commission expires: November 15, 1986

/s/ Janice M. Cyzick
Notary Public

FJZ

257 NLRB No. 148

D—7878
Maidsville, WV

UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

Cases 6-CA-12289 and
6-CA-12533

MAIDSVILLE COAL CO., INC.

and

UNITED MINE WORKERS OF AMERICA, DISTRICT 31

DECISION AND ORDER

On March 16, 1981, Administrative Law Judge Robert G. Romano issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief. The General Counsel and the Charging Party each filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions

with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

We agree with the Administrative Law Judge that a fair election has been precluded by Respondent Employer's unfair labor practices, and that a bargaining order is the appropriate remedy. In this regard, we note that the Employer engaged in repeated violations of Sec. 8(a)(1) and (3) of the Act and that these violations were of such a pervasive and extensive nature that our ordinary and usual remedies would not erase them sufficiently so as reasonably to insure the future holding of a fair election. In particular, the evidence establishes that, at the outset of its employees' union organizational activities, the Employer commenced a campaign designed to undermine and erode the Union's majority support among its employees by discharging four identified union supporters on the sole basis of these employees' union sentiments. At the same time, the Employer violated the Act by interrogating employees concerning their union activities and sentiments; by granting wage increases; by making various promises of improved working conditions and benefits in order to dissuade employees from supporting the Union; and by threatening employees with discharge, layoff, and other reprisals, including the cessation or reduction of operations, if they continued to engage in activities on behalf of the Union. Thereafter, the Employer enlisted the aid of a third party to threaten an employee with physical harm if he continued to support the Union.

Under these circumstances, including the small size of the employee complement in question and the substantial percentage of the work force subjected to the Employer's unlawful terminations and other unfair labor practices, we find that a bargaining order is necessary and appropriate in order to protect the majority sentiment expressed through the authorization cards and to otherwise remedy the violations committed. However, as the Union did not request recognition until April 19, 1979, and Respondent Employer's other unfair labor practices are remedied by the Order herein, we find, contrary to the Administrative Law Judge, that Respondent Employer's bargaining obligation arose as of April 19, 1979. See *Cas Walker's Cash Stores Inc.*, 249 NLRB 316 (1980), and cases cited therein at fn. 3.

Member Jenkins would as he stated in *IDAK Convalescent Center of Fall River, Inc. d/b/a Crawford House*, 238 NLRB 410 (1978), date the bargaining obligation from either the date of the Union's

the Administrative Law Judge and to adopt his recommended Order.[2]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Maidsville Coal Co., Inc., Maidsville, West Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order,[3] except that the attached notice is substituted for that of the Administrative Law Judge.

Dated, Washington, D.C. September 1, 1981

JOHN H. FANNING, Member

HOWARD JENKINS, JR., Member

DON A. ZIMMERMAN, Member

NATIONAL LABOR RELATIONS BOARD

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demand for recognition or from the commencement of the unfair labor practices, whichever is necessary to remedy all the unfair labor practices.

The Administrative Law Judge correctly found that Respondent violated Sec. 8(a)(1) in granting an unscheduled wage increase to, *inter alia*, employee James Fain. However, we disavow the Administrative Law Judge's characterization of Respondent's motivation for the size of the increase as having been "in part" for antiunion reasons. We find the 8(a)(1) violation because the Administrative Law Judge correctly determined that the overall effect of the wage increase was to "interfere with, restrain, or coerce" Fain in the exercise of his Sec. 7 rights.

[2] Nothing contained in our Order will require or authorize Respondent to withdraw or discontinue any wage increases previously granted.

[3] In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board
An Agency of the United States Government

WE WILL NOT unlawfully interrogate our employees because of their union activities, sympathies, and desires and the union activities, sympathies, and desires of their co-employees.

WE WILL NOT unlawfully grant our employees wage increases in order to dissuade them from supporting the United Mine Workers of America, or its District 31; and WE WILL NOT promise our employees increased hourly wages, improved working conditions, and other benefits in order to dissuade them from selecting the Union as their collective-bargaining representative and/or from engaging in activities on behalf of the Union.

WE WILL NOT threaten our employees with discharge, layoff, and cessation or reduction of operations if they select the Union as their representative, and with nonrecall because of union activities; and WE WILL NOT utilize a third party to threaten employees with reprisal or physical harm if they continue to engage in activities on behalf of the Union.

WE WILL NOT discriminatorily discharge, or cause the termination of and/or constructively discharge, our employees.

WE WILL NOT refuse to recognize the United Mine Workers of America, as the designated exclusive collective-bargaining representative of an appropriate unit of employees at our Maidsville, West Virginia facility. The appropriate bargaining unit is:

> All production and maintenance employees employed at our Maidsville, West Virginia facility; excluding office clerical employees and guards, professional employees and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the above-described appropriate unit with respect to rates of pay, hours of employment, and other terms and conditions of employment of the employees included within the appropriate bargaining unit.

WE WILL offer Richard G. Heller immediate reinstatement to his former job of weighmaster, or, if such job no longer exists, to a substantially equivalent job, without prejudice to his seniority and other rights and privileges; and WE WILL make whole employees Earl F. Bowman, William Kent Eddy, Charles L. Trippitt, and Richard G. Heller for any loss of earnings, plus interest, they may have suffered by reason of the unlawful discrimination against them.

MAIDSVILLE COAL CO., INC.
(Employer)

Dated ..... By .....
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Porter Building, 601 Grant Street, 10th Floor, Pittsburgh, Pennsylvania 15219, Telephone 412-644-2969.

JD-107-81
Maidsville, WV

UNITED STATES OF AMERICA BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

Cases Nos. 6-CA-12289
6-CA-12533

MAIDSVILLE COAL COMPANY, INC.

and

UNITED MINE WORKERS OF AMERICA, DISTRICT 31

Matthew M. Franckiewicz, Esq., and Peter R. McClain, Esq., for the General Counsel.

Robert M. Steptoe, Jr., Esq. and Michael L. Bray, Esq. (Steptoe & Johnson), of Clarksburg, WV, for the Respondent.

Kenneth J. Yablonski, Esq. (Yablonski, King, Costello & Leckie), of Washington, DC, for the Charging Party.

DECISION

Statement of the Case

ROBERT G. ROMANO, Administrative Law Judge: These consolidated cases were heard at Morgantown, West Virginia, on December 3-7, 1979.[1] The original charge in Case No. 6-CA-12289 was filed on April 20 (amended

[1] All dates are in 1979 unless otherwise indicated.

April 27) by United Mine Workers of America, District 31 (herein Charging Party Union) against Maidsville Coal Company, Inc. (herein Respondent Employer); and original complaint thereon issued June 13. Original charge in Case No. 6-CA-12533 was filed on July 6 by the Union against the Employer; complaint thereon issued on August 21; and thereupon the above cases were ordered consolidated for hearing.

The thus consolidated complaints allege that Respondent Employer has on various dates in April and May unlawfully interrogated and created the impression of having unlawfully interrogated employees as to their union activities, sympathies and desires; variously threatened employees with discriminatory discharge, layoff, cessation of operations, non-recall of employees, and reprisals of physical harm; discriminatorily promised and granted wage increases; and promised improved working conditions and other benefits, in violation of Section 8(a)(1) of the Act. The complaints further alleged that on April 13 the Employer has discriminatorily discharged its employees Earl F. Bowman, Charles L. Trippitt, Richard G. Heller and Willard Kent Eddy, thereafter refusing to reinstate them until April 23; and that it has subsequently caused the termination of employment of (constructively discharged) Richard G. Heller on May 21; all in violation of Section 8(a)(3) and (1) of the Act. Finally, the complaint alleges that the Employer has refused to bargain with the Union as the designated representative of its production and maintenance employees as of April 19 in violation of Section 8(a)(5) and (1) of the Act, though it is also alleged that the Union had obtained its majority designation earlier on April 10, and a remedial bargaining order is sought as of that date in view of certain earlier Employer conduct. On June 19, and August 23, Respondent Employer filed answers to the respective complaints, denying the commission of any unfair labor practices.

Upon the entire record,[2] including my observation of the demeanor of the witnesses, and after due consideration of the extensive briefs filed by the General Counsel on February 11 (dated February 6), by Respondent on February 7, and by Charging Party on January 31, 1980, I make the following:

FINDINGS OF FACT

I. Jurisdiction

Respondent is a West Virginia corporation with sole place of business in Maidsville, West Virginia, where it is engaged in the preparation and nonretail sale of coal. Respondent Employer annually ships goods and materials valued in excess of $50,000 to firms or enterprises located within the State of West Virginia which are themselves directly engaged in interstate commerce. The complaints allege, Respondent by Answers filed admits, and I find that Respondent is an employer engaged in commerce within the meaning of Sections 2(6) and (7) of the Act. At hearing Respondent also admitted, and I find that United Mine Workers of America, and United Mine Workers of America, District 31, are labor organizations within the meaning of Section 2(5) of the Act.

II. The Alleged Unfair Labor Practices

A. *Background*

1. The Employer's Operation; and Stipulated Management Hierarchy

The Employer has been engaged in the nonretail sale of specialized coal to industrial users for approximately 9 years at its Maidsville, West Virginia tipple facility. John Petitte is president of Respondent-Employer and has

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[2] General Counsel's unopposed motion to correct the record dated January 30, 1980 is granted, and it is received as General Counsel's Exhibit 18.

occupied such position since Employer's formation in October 1970. Jasper Petitte is vice-president of Respondent-Employer. Charles Guseman, brother-in-law of Johnny Petitte, has been employed by Employer since 1970, and during all material times (I find) was employed as Superintendent. On the basis of the parties' stipulations and/or evidence of record, I find that John and Jasper Petitte, and Superintendent Charles Guseman, during all material times were supervisors within the meaning of Section 2(11) of the Act. The parties have further stipulated and I additionally find, that during material times through and inclusive of April 21, that James Casino, occupied the position of dayshift foreman, and that Casino also was a supervisor within the meaning of Section 2(11) of the Act. As of the tenth of April, the Employer operated but two shifts, a day shift and an afternoon shift. The matter of utilization of an afternoon shift foreman is in issue. Generally, Employer in the conduct of its above tipple operation essentially employed plant, machine, and barge operators, and a scaleman or weighmaster.

2. The Appropriate Unit; Unit Composition and Majority Issues preliminarily defined

a. *The Appropriate Unit*

The complaint alleges, and on this record, I find that all production and maintenance employees employed by Employer at its Maidsville, West Virginia facility, excluding office clerical employees, guards, professional employees and supervisors as defined in the Act constitutes a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

b. *Composition and Majority Issues*

It is uncontested that a bargaining demand was first made by the Union upon the Employer on April 19. The General Counsel and Charging Party additionally contend

(and it is denied by the Employer) that the Union had attained a collective-bargaining representative status as evidenced by valid card majority of the employees in the above-determined unit as of April 10. On basis of allegations of Employer's simultaneous and extensive commission of unfair labor practices in violation of Sections 8(a)(1) and (3), commencing early in April, the General Counsel and Charging Party Union have herein contended, *inter alia*, in remedy thereof, for a remedial bargaining order as of April 10, in addition to finding a violation of Section 8(a)(5) in Respondent's subsequent refusal to bargain with the Union upon demand on and after April 19. At these material times Employer operated a day and afternoon shift.

In that respect, employed on day shift and working as of April 10, were Willard K. Eddy, William Elliot, Dennis Ingersoll, Howard Tennant, and Richard *Heller*. It is uncontested also that James Fain, a recently hospitalized day shift employee, remained an employee; and Fain is thus to be included in the unit as of April 10 (indeed 19).[3] Employed on the afternoon shift as of April 10 were: Earl Bowman, Kenneth R. Roberson, Charles Trippitt, and Jeff *Freeman*. The record reveals clearly, and I find: that employee Earl Bowman validly designated the Union as his exclusive collective-bargaining representative on April 9; and that afternoon shift employees Roberson and Trippitt did so on April 10, as did day shift employees Eddy and *Heller*. The parties are in major dis-

[3] Though not appearing on the time and attendance payroll records specifically for April 10, other record evidence reveals Fain had been previously employed in February and March on day shift (apparently) as a general yardman, before being shot (apparently) over a weekend and hospitalized. Such records as were made available reveal that Fain's absence began March 26 (Monday) and that he returned to work on April 23. Fain was thus absent for about a month. Fain, who worked until he quit on November 5, did not testify and the record reflects his whereabouts were not known at time of hearing.

pute over the inclusion/exclusion of *Richard Heller* and *Jeff Freeman.*

Heller was originally hired as a scaleman or weighmaster (in 1976). Following layoff in February, Heller was recalled to employment, but as general yardman, or feeder operator as Heller asserts, in place of the injured employee Fain. The General Counsel and Charging Party Union would include Heller as a production and maintenance employee; and they would exclude Freeman on the basis of contention that he was the afternoon shift foreman and a supervisor and/or that Freeman should be excluded because of the special status he otherwise is shown to have occupied in relationship to the Employer. (The complaint herein alleges that Freeman was a supervisor and agent and that through Freeman's conduct the Employer has engaged in certain of the above unfair labor practices.) In contrast the Employer would include Freeman, contending that he was not a supervisor but a production and maintenance employee; and Employer, in turn, contends for exclusion of Heller as a supervisor and/or as a managerial, confidential, or office clerical employee.

It is readily apparent from the above and the record otherwise[4] that the parties are in essential agreement as

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[4] The parties stipulated that Eric Shreve (a day shift welder) who appears on certain records, had eariler quit Respondent's employment on March 21 and is not to be included in the unit. New employees Pete Guariglia, William Howdershelt, and John Price apparently were hired on April 18, did not begin work until April 23. Clearly they were not employed as of April 10. The General Counsel also correctly observes that employees who had been hired but who had not yet begun to work as of the material date of demand for, and refusal of, recognition and commencement of bargaining are not to be included in the unit for purposes of determining majority status, Cf. *Western Drug*, 231 NLRB 890 (1977), enf. den. on other grounds, 600 F.2d 1234 (9th Cir. 1979). The parties also clarified by stipulation that employee Nicholas Myers quit Respondent's employment in August of 1978, was later

to the inclusion of eight employees in the unit, four of whom had signed valid designation cards for the Union by April 10, and four of whom had not. The major issues of contention as raised by the parties over the unit placement of Heller and Freeman are observed to involve not only issues of unit composition, but the majority status of the Union itself. It would appear only necessary to additionally note in passing that although the record reflects that an additional authorization card was signed by one former employee, Andrew Long on April 11, it also reveals that another former employee William Randy Phillips who (uncontestedly) occupied the same employment status as did Long, did not sign an authorization card. All parties appear to be in agreement that the actual status of Long and Phillips need not be resolved, since as a practical matter all parties would concede an identical status is occupied by them; and their inclusion or exclusion could thus not affect the majority designation issue herein. In agreement with the parties, I thus find it unnecessary to resolve their status in this proceeding.[5] As Heller and Freeman occupied their employment in a

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rehired, but similarly began work on April 24. Accordingly, all parties appear to be in agreement, and in any event I find, that employees Guariglia, Howdershelt, Price and Myers are not to be included in the unit for purposes of establishing the Union's claimed majority on either April 10, or 19.

[5] I do note that Jasper Petitte testified that he had instructed foreman Casino to fire Long and Phillips and that they received low earnings slips (for unemployment compensation) by a deceit of the office clerical. However, Janice Cyzick, called by Respondent testified that foreman Casino told her that Long and Phillips were laid off, and could receive low earnings slips. Jasper Petitte acknowledged that by the time he became aware of it, he simply decided to let it go. As is noted herein, Casino was not called on this, or other matters. Employee Eddy related that Long and Phillips missed work on Thanksgiving at the same time that Eddy did. Eddy testified that he was suspended for 3 days after which he was returned to employment, but that Long and Phillips were either fired or laid off and did not work again.

relatively small employer operation, and since resolution of their individual status appears central to contentions of all parties, and resultingly was much litigated by all the parties, I shall address and evaluate the record evidence of their duties and performance only after an initial review of Employer's business and operational structure and background.

B. *The Operations*

Johnny Petitte (hereianfter simply Petitte) testified that when a predecessor coal company moved from Employer's present locale it had left mostly junk. There were then 4-6 piers in the river and an abandoned tipple. Petitte originally worked in Employer's yard (with two or three other employees); and for about 4 years he operated a high lift (endloader) himself and loaded barges. In 1975-76 Petitte had a preparation plant built; in 1978 he added a scale and built a scale house; and in 1979 he refurbished the river tipple, discussed *infra*. Petitte relates that he presently spends 2-3 days at Employer, and is still occasionally active in physical work, though otherwise roughly estimating he regularly spends one-third of his time in the office, one-third at the plant and loading operations and the remaining one-third at his mines, one being organized by the Union (Petitte Brothers Mining Company, Inc.) and one unorganized (Electra Fuels, Inc.). (Still another mine, Jasper Coal Company, was shut down in early 1979 for economic reasons).

Broadly and physically viewed, Employer's present operation is thus composed of: a (truck) scale for weighing incoming coal; an adjacent weigh-scale house, or building, with several rooms (supply and offices); tipple preparation plant, with plant waste-discharge setting ponds; a yard area with some stock piling area, two loading facilities, a river tippel (with barge access) and a railroad tipple (with rail access); and various equip-

ment, including 2-3 endloaders (high lifts). In functional operation coal supply is purchased and brought in by independent truckers either from the mines owned and independently operated by the Petittes or from independent mine producers. On arrival the raw coal is first weighed by a scaleman (or weighmaster), who records the tonnage received; and the coal is then dumped for either further coal preparation or raw processing, prior to loading and shipment to Employer's customers by barge or railroad car.

Coal dumped by a feeder near the preparation plant is pushed or carried into a hopper by an endload (feeder) operator, from which point the coal travels up a conveyor belt into the preparation plant, which is itself operated by a separate plant operator. At the mouth (apparently an end) of the plant there are three stacker belts. Employer's plant has capacity to stack only 350-400 tons. Thus, normally a second endloader is kept at this location to move processed coal away. However, it appears that the endloader kept at this location to move processed coal away is one which may be operated by anyone of several individuals. There is considerable regular and ongoing maintenance associated with (all) conveyor belts and rollers over which belts are propelled. Both have to be kept greased and/or clear to run freely at all times. The conveyor belt lines thus have to be regularly walked and checked; and from time to time, broken belts and rollers have to be repaired. There is also a "Gig" or washbox in the plant where coal is washed. Steel graded hoses have to be kept in repair. Resulting slurry (from plant wash) is itself pumped underground across railroad tracks and up a hill to a series of settling ponds where the coal residue is designed to settle with discharge of clear water eventually made into a creek which runs by the scalehouse into the river. Discharge water must be periodically checked for acceptable clarity.

As noted, Employer has a loading facility at the river where barges are pulled up and filled with coal by a barge operator/loader. Movement of the barge in the past has been either manually, by power wench, or on request, with assistance of a tugboat owned by a nearby and organized company. Employer has a crusher for coarse coal at its river tipple (and one at its railroad tipple). The crusher(s) from time to time will plug up with fine coal, at which time it (they) must be cleaned out. This cleaning operation is itself a 2-3 man operation requiring electrical power disconnects by a (knowledgeable) employee, and (laborious) prying, sledge hammer and shovel work by 2-3 employees. Often times railroad cars, prior to their fill at the railroad tipple have to be first cleaned of pellet, iron and other debris, by shovel or spill, and the waste then moved away by shovel, or endloader. The 2-3 endloaders used in Employer's operation are described as old and requiring considerable maintenance and/or prompt repair, as they may be needed in several locations for the operation to continue. Since April 23 Employer has operated three such shifts. Prior to start of each shift, under existing governmental regulation, the Employer must inspect and certify that its plant and/or equipment are safe and ready for use. (The recording is made on a separate preshift report.) In passing it is noted that the weighmaster (who works day shift) will record on the daily report (in addition to record of incoming coal tonnages) any and all barge and railcar shipments, including tonnages shipped, discussed *infra*. As noted the central issue of litigation in this proceeding have revolved around the status of two individuals, Jeffrey L. Freeman and Richard Heller.

C. *The employment history and duties performed by Jeffrey L. Freeman and Richard G. Heller through April 10.*

1. Jeffrey L. Freeman

In 1975-76 Petitte had Employer's preparation plant built by Interstate Engineers, a local construction firm. Freeman was hired at that time from one of the latter's working crew by Jasper Petitte and Guseman because of Freeman's demonstrated welding skills and mechanical ability. In a word, Petitte summarizes that Freeman can do everything; and Petitte has testified, with much record support, that in addition to a varied use of such welding skills for Employer, Freeman can operate all the equipment; is more skilled with the highlift and (general) machinery repair than others; can operate the plant at least as well as others; has loaded barges and railcars; is the most experienced employee in electrical matters, and handles the power disconnects; and does other physical work, essentially doing whatever needs to be done, including shoveling tail pieces, as necessary.* Freeman confirmed that he had done welding and pipefitting work on the original preparation plant; was then hired by Employer on June 15, 1976; and initially worked on day shift as a plant operator, but also had run a highlift and did anything else required to be done. Following about 6 months working on day shift Freeman began working on the afternoon shift, where he had continued working through early 1979.

Apart from the contentions made by the General Counsel and the Union that Freeman served also as an after-

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* It appears that tailpieces are actually part of the machinery located at belt line ends and which regularly create coal spillages. In any event, coal at certain locations would pile up under the belt; and the coal then had to be manually shoveled out from time to time. Such a work assignment is herein referred to as shoveling tailpieces.

noon supervisor, it is clear of record that there was otherwise no supervisor present throughout the afternoon shift. Nonetheless Petitte, with corroboration from Freeman, has testified that Freeman had never been granted authority to hire or fire, to discipline, or grant wage increases, nor recommend same; and that the work on the afternoon shift got done because the work was basically routine; the afternoon crew was a close-knit experienced work force that knew what had to be done; and (with corroboration from Guseman) the crew received such instructions as were necessary, directly (or indirectly by note) from Guseman who frequently worked beyond 3 p.m., or from Petitte, who was frequently there at shift overlap, or returned at night. As otherwise described and summarized by Petitte, Freeman was simply a skilled employee and a hard worker, a go-getter, with nerve, who kept the plant running on the afternoon shift mainly because of his welding and mechanical skills; and who, because of his personal attributes and characteristics became a self-appointed leadman, and in the eyes of the men, a spokesman for them.

Guseman confirmed that he usually worked from 7 a.m. to 3 p.m. (day shift); but that he would stay after 3 p.m., usually 2-3 times a week; and that he was on call 24-hours a day. Guseman testified that he was responsible for the operation of the yard; and that he instructed the day shift employees as to what they were to do, including deciding when maintenance work needed to be done and also making employee reassignments on job completion. Guseman reported directly to both Johnny and Jasper Petitte; and he testified that it was Jasper Petitte who decided what type coal was to go in a given barge; and that the latter's instructions thereon were relayed to the men through Guseman. Guseman confirmed that Petitte was there most of the time during daily operations; and testified that Petitte was unquestionably known to be the boss. According to Guseman,

Employer had had no prior set policy in regard to the various authorities of hiring, firing, or granting wage increases, though everyone recognized that Petitte was the individual in charge; and that before anything happened it went over Petitte's desk. Nonetheless, Guseman testified also that hiring has heretofore been accomplished by the Petittes and himself. (Guseman's variant testimony as to firing and discipline by himself and Freeman is deemed too inconsistent to be dispositive.)

According to Guseman, James Casino, though assigned and working (since April 23) as a plant operator on a then (newly) instituted night shift, had formerly worked with him as a foreman on day shift. Guseman confirmed that when occasion required it that he had left general instructions with Casino (directly or indirectly by note) as to what Guseman wanted done on the day shift; and he (significantly) acknowledged that general instructions were similarly left by him for Freeman as to what worked he wanted done by the afternoon crew. While confirming that Freeman had performed various physical work (which none of the employees herein deny) including shoveling tailpieces, Guseman acknowledged that (admitted) supervisor Casino had similarly done as much on day shift; and indeed, that Guseman also had shoveled tailpieces, though only when necessary.

Employed on the afternoon shift with Freeman were feeder operator Trippitt; plant operator Roberson and barge operator Bowman. (Bowman and Trippitt were called as witnesses by General Counsel, Freeman and Roberson by Employer.) Trippitt testified that when he spoke to Guseman about a job and was hired (I find on May 22, 1978), that Guseman had informed him that Freeman was the afternoon shift boss. Trippitt also testified that when he reported for work it was Freeman who had taken his name and social security number; who told him what his pay would be, $4.50; and who

then showed him what he was to do, telling Trippitt that every man should know what to do on the job. Freeman put Trippitt initially to work in the plant, hosing and shoveling tailpieces; and later Freeman directed Trippitt to learn to run the highlift. The record reveals that Trippit has received three raises. Trippitt testified that he had asked Freeman on the first two occasions for a raise, that Freeman said he would check into it; and that a week or so later, Freeman had come back to him and said the raise would be on Trippitt's next check; and it was.[7]

Trippitt has also testified that when he wanted to leave early, he has informed Freeman, who had then told him to go ahead and leave. On other occasion Freeman has instructed him to work all night to get the barges loaded, and told Trippitt that if he didn't want to work, not to bother to come back. On other occasion Freeman has told Trippitt to quit work before a regular end of shift at 11 p.m. (e.g. because a barge was struck, or power was out). Trippitt also testified that Freeman has frequently taken him off one job and put him on another, e.g. while running the loader, Freeman has told him (and others) to go to the river and pick slate, or to gauge barges, or to do maintenance work, grease the belt (rollers), shovel tailpieces, or change filters. Freeman was called when there were problems at work, e.g. when the crusher became plugged; or for instructions as to the type coal that was to be put in a barge.[8] Trippitt also

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[7] The first rate received after 3-4 months was for 50¢, the second for 75¢. The special circumstances under which Trippitt received the third raise are discussed, *infra*.

[8] On the other hand Trippitt candidly acknowledged that in the Spring of 1979, while Freeman was welding, in remodeling the tipple at the river (some 100 yards from the plant), the employees could and did run the plant (without Freeman) just as well as if he was there. However, the record reveals that Freeman was on call even then for breakdowns. Trippitt also testified that more

testified that he has been sent by Freeman to pick up parts.

Earl Bowman, herein Bowman, testified that on August 7, 1978 he had received a call from his father (herein Bowman Sr.) who operates a tug (Donna Lee) for Consolidated [sic] Coal, advising he had heard there was a barge gauger job opening at Employer. They went down that evening about 5 p.m. At that time Employer was building its (temporary) scalehouse, and Petitte and Freeman were both present. Bowman's version is that his father asked Petitte if he was doing any hiring. Petitte said to talk to Freeman.[9] Bowman recalled his father then asked Freeman if they were doing any hiring; and Freeman asked Bowman if he knew how to run an end loader. Bowman replied no, but added that he was not afraid to learn. Freeman told Bowman to be back there the following afternoon, with his hard hat, hard toes (shoes), and lunch bucket. Bowman acknowledged that Petitte was present while Freeman spoke to him, but Bowman repeatedly could not remember if Freeman had talked to Petitte in the interim, i.e., before telling him to report to work the next day. Employer's version (Petitte and Freeman) is essentially that it was at the direction of Petitte that Freeman had made the inquiry of the Bowmans as to what they wanted; that Freeman reported back to Petitte before Bowman was hired; and that Petitte had thus done the actual hiring. In the light of the unsureness on Bowman's part as to whether Freeman had conversed again with Petitte before Bowman was told he was hired, I conclude and find that Freeman did so. However, the record also reflects a candid acknowledgement by Petitte of an initial unfavorable impression as to the physical suitability of

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recently that Superintendent Guseman and Freeman were rotating on day and afternoon shifts every 2 weeks.

[9] On one occasion Bowman has Petitte initially reply yes, and on another occasion that he didn't know, to ask Freeman.

Bowman for the job; asked for opinion of Freeman who pointed out the favors [10] that the tugboat Donna Lee had done for Employer, along with observation they did need some river help at the time. In my view the evidentiary circumstances described above reflect an effective hiring recommendation. However, the issue of Freeman's status need not be left resolved on such limited basis.

On August 8, 1978 Bowman reported for work at 3 p.m. According to Bowman, Freeman first recorded Bowman's name and social security number; and then Freeman took Bowman through the yard, to the plant. There Freeman introduced Bowman to loader/operator Trippitt, telling Trippitt that he was to show Bowman what to do, advising that Bowman would be in there for a couple of weeks on a trial basis. During that period Bowman shoveled tailpieces under belt lines; and hosed down coal dust in the plant basement. Bowman was thereafter, put on loading barges on afternoon shift, which he (at time of hearing) had been doing for over a year, and proficiently so. Bowman testified that he regarded Freeman as his boss, and a foreman. More significantly he testified credibly that one day in October (1978) Freeman came to the barge and (without earlier request being made by Bowman) told Bowman that he was due and deserved a raise; that Freeman would tell Guseman to tell Petitte that; and that 2-3 hours later Freeman came back and told Bowman he had a $1 raise on *this* pay (thus effective immediately). (Petitte has confirmed that his initial impression was incorrect and that Bowman has proven out to be an excellent worker.) Bowman testified that Freeman has told the afternoon employees that they could quit early (when there was no coal to

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[10] Consolidated [sic] Coal has river tipple facilities about 300-yards from Employer. On several occasions barges arriving at Employer's tipple for loading, had become hung up because of river dredging. On request, they were brought in by the tug Donna Lee.

clear, and all agreed to go home); that Freeman on other occasions had told them they were to do other jobs (e.g. maintenance, grease belts, shovel tailpieces, or hose down the plant); or when the barge was stuck, has told Bowman to tie it up, and to go up to plant and clean there; that in March-April Freeman had also told him to work overtime; and corroborated Trippitt that Freeman had told them that if they didn't work overtime, that they just as well not come back to work, that they would be fired. Bowman also testified that Freeman has taken him off one job, and put him on another; e.g., if he was working on railroad cars, and a barge came in, Freeman would send him down to barge, saying Freeman would finish up on railroad cars. Freeman has also told Bowman to get an end loader and clean up the nut coal (stock), or directed him to pick up supplies. Bowman relates that on another occasion in March or April at a time when there were three barges in, Freeman had also told them that they had let him down because he had told Petitte that they would load all three barges, but they had only loaded one. Bowman responded that they were having problems at the time, but Freeman nonetheless thought they should have loaded the barges; and Bowman relates that there was an argument between them. On the following day Guseman came up to Bowman and inquired as to what had happened. Bowman told him. Guseman then told Bowman that there was no reason why Bowman couldn't get along (with Freeman); and that Guseman thought Freeman treated Bowman pretty good down there. Bowman agreed.[11]

Freeman testified that he had received Vocational-Technical and military maintenance training in auto

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[11] Somewhat less convincing, because of nature of leading question eliciting it, was Bowman's additional testimony that Guseman explicitly had stated to him (also) on this ocassion that Freeman was the boss of the afternoon shift, though Guseman had no recollection.

motors, endloaders, trucks and heavy equipment; and that over the years he had obtained other various certifications *viz.*, as a state certified welder; electrician's surface certificate; gas detection, mine safety, and first aid. Freeman relates that he was thus qualified to fill out the preshift (inspection) reports for Employer, noting such have to be additionally countersigned, usually by Superintendent Guseman.[12] Freeman relates in summary of his duties that he performs maintenance work on the equipment, welds and fits pipe, loads railroad cars and barges, checks the ponds, shovels tailpieces; and knows how to run the scales, and has on occasion weighed trucks (as have certain other employees). However, Freeman denied that he had authority to hire or fire employees. Freeman related that he arrives at work usually at 3 p.m., thus at a time when the Petittes and Guseman are there; and he asserts they will tell him what they want done, either directly or by note left at the scalehouse or passed on to him by Heller or Roggish which he then passes on to the men; that he told the men what to do because he had been instructed to tell them what to do; and that one of the Petittes may direct him to see if the men will work overtime (and he will inquire), or on other occasion the Petittes may require the crew to work overtime, which he then only passes on to the crew.

Employee Roberson relates that following his retirement from the military he had been hired and (now) employed by Employer for a little over 2 years. During that period he has regularly worked as plant operator on

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[12] In that contrast, Heller made no such inspections, and testified that he had filled out the (routine) preshift reports for foreman Casino, and signed Casino's name, at Casino's direction. Roggish in that respect has testified, that there was a preshift or shift report which supervisors have to keep and that she did not put any information in that book. Heller has also filled out the form for Freeman, which the latter then signed.

the afternoon shift,[13] though he has also performed other work, including operating a highlift and doing some welding on the third shift. Roberson confirmed that he had received instructions, directly and indirectly from Guseman, or after Heller left, from Roggish; and that employee duties were more or less routine. Roberson related that in the event of a plant shutdown he would notify Guseman. Other testimony of Roberson, however, then candidly acknowledged that Guseman was mostly present for (but) the first one-half hour of the afternoon shift; that normally Roberson had received his orders from Freeman who told Roberson what to do on the shift; that Freeman, from time to time, has taken him off one job and assigned him to another (e.g. from plant operation to running a highlift, or loading barges or trucks); that Roberson has informed Freeman when he needed to leave early, who took Roberson's place till end of shift. Thus, Roberson also testified that if the plant was shut down, and Freeman was present on premises, Freeman was the one first notified; and Freeman would then decide what maintenance work was to be done to get the plant back in operation; or, whether Roberson was to do some other work, or to go home. According to

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[13] Roberson described plant operation and his related duties as follows: Coal is fed into the plant through a hopper by a highlift operator, normally Trippitt, though Roberson and Freeman have on occasion also done this work. The plant itself is fed by conveyor belt; and coal is processed through a crusher and carried (out) by belt. The plant operator regulates the coal flow. However Roberson also explained that if coal is not continuously fed into the hopper, the plant itself has to be shut down, in sequence (bled down through a series of switches and valves), to minimize damage to the equipment. Thus Roberson relates that if he were to observe the highlift (feeding) operation shut down, he would contact the feeder by phone to determine what was wrong; and if coal was not to be continued to be fed into the plant, Roberson would then automatically shut the plant down. If the situation were one where there was no coal to feed into the plant, it was also shut down; and employees would then do whatever maintenance work they could do.

Roberson, if Freeman is not there, usually Guseman is. Otherwise he would leave word for Guseman, Freeman (or Casino) for further advice or instruction as to what he was to do, whether (in case of highlift breakdown) to seek a highlift from another area, or whatever. Finally, Roberson revealingly testified that though Freeman does more mechanical work and Guseman more supervisory work, the one job that Freeman did more than another, was to oversee everything, check on what the afternoon shift was doing, whether they needed equipment, cars, whatever; and that Freeman regularly told the afternoon shift employees what they were to do, not vice versa.

Freeman, an hourly paid employee (unlike Heller), during the UMW strike which commenced December 7, worked beyond other hourly employees, but only until December 21, before layoff. However, prior to a last raise received (effective April 4), Freeman was the highest paid hourly employee at $7.75 an hour. Additionally this record reveals that Freeman had initially rented a house from Petitte for $200, but had since lived in the house without rent as part of his salary. (He has performed some caretaker functions and property improvements; and he has a first option to buy.)

Freeman himself has otherwise acknowledged that employees wanting time off have reported their leaving early to him; that on occasion he has worked the crew overtime on his own, e.g., to repair equipment when broken down; that he does spend most of his time moving around ensuring that plant operations are kept running; that he can charge parts up to $100 on his own; that he has sent other employees out to get parts; that Guseman does rely on him to make sure the work for the afternoon shift gets done, because Guseman knows that Freeman knows how to get things done; that the employees have openly referred to him as foreman; that he has told employees during a shift to do certain work; that on other occasion, e.g. the work being done, he and the crew have gone home

early; and that employees regularly have asked him for raises and he in turn has spoken to Guseman (or Petitte) in their behalf and in doing so has reported how the employees have been working.

Guseman too has acknowledged that he left instructions with Freeman (as he did with Casino) because Freeman got things done running the shift and usually saw to it that the work was done; and that (both) the men knew Freeman was to let them know what they were to do, and the employees understood that Freeman was the person whom Guseman was depending upon to get things done on the afternoon shift. Consistently, Guseman testified that it would not surprise him, nor would he regard it as unusual, that employee Roberson would approach Freeman with request for (personal) time off; and Guseman (eventually and essentially) acknowledged that Freeman had approached him, at different times, about raises for individual employees and that Guseman had used Freeman's evaluations therein.[14] Finally, Petitte acknowledged that he was aware that Freeman had let another employee leave early and did not subsequently reprimand Freeman for doing so, indeed, had no reason to question his authority to do that; that he does have regard for the opinion of Freeman as to what is going on down there; and that he assumed that Guseman had talked to Freeman as to his opinion on wage increases; and that

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[14] Guseman testified that he had to confer with Petitte, and usually did so; though he asserts also that he did not do so before granting certain raises to Freeman, Tennant and Roberson (effective April 4) discussed *infra*. Although at one point asserting that he did not recall discussing the matter (of raise grant) with Freeman, asserting rather that he used his own judgment, Guseman then otherwise testified, and I find much more plausibly so on this entire record, that since Freeman worked more with the men than he did, it was possible that he would have asked Freeman what Freeman thought; *and* that he had used it (Freeman's evaluation) in formulating whether he (Guseman) should go on to Petitte in getting an increase approved.

Guseman had used that opinion as basis to establish wage increase.

The evidence and other evidence of record has thus wholly convinced me that Jeff Freeman prior to April 10, was more than simply a self-appointed working leadman.

Thus this record makes it abundantly clear that Freeman regularly directed the afternoon shift work force; and he exercised independent judgment in doing so. Moreover, whatever may have been his personal and ability characteristics that led to his occupying such position, his performances in those respects were with Employer's clear awareness, and equally clear implied concurrence and consent. It is also readily apparent that he otherwise exercised supervisory authority: in exercising his independent judgment in granting time off to individual employees; on occasion regulating the usual hours of the shift, reducing it, when slack, and working the shift overtime (on occasion) when desired (and warranted); and (I find) in effectively recommending pay increases for employees. Accordingly, I conclude and find that during all times material herein prior to April 10, Jeff Freeman occupied the position of a working foreman and that Freeman was a supervisor within the meaning of the Act.[15] Having so reached conclusion of supervisory

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[15] Additional record evidence of actions taken subsequent to April 10 only buttress such conclusion. Thus, on Friday, April 13, as discussed *infra*, Freeman delivered discharge letters to employees Bowman and Trippitt. Petitte would seek to minimize this action as the mere carrying out of an instruction given an employee, as with Heller, also discussed *infra*. I disagree with such a cavalier view of that circumstance. The record fact is that it was Freeman who brought his crew employees (Trippitt and Bowman) to the office and there notified them of their discharge; as notably also did foreman Casino the next day to Heller; and Guseman the following day to Eddy. I further note in passing that Petitte acknowledged that he was aware that Freeman more recently sent an independent truck driver home for engaging in horseplay; an action which was neither countermanded by Guseman, nor censured subsequently by Petitte.

status which carries with it automatic exclusion from the appropriate unit herein, I need not reach other arguments advanced by General Counsel and the Union herein that Freeman during material times occupied a special status with Employer which carried with it substantial interests so divergent from the interests of other unit employees as to reflect a lack of community of interest with those unit employees and consequently clear warrant for Freeman's exclusion from the union on that account alone.[16]

2. Richard G. Heller

Heller was initially hired by Employer in November 1976, and worked as a scaleman or weighmaster until he

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[16] Essentially the record does establish that Freeman during material times had occupied a mutually beneficial and increasingly significant separate business relationship with Employer. Thus Petitte acknowledged that within the past 2 years Freeman has been independently contracted 2-3 times to perform work for Employer, e.g. to build (weld and install) iron pipe gates; and further acknowledged Freeman as Freeman Welding Service had done welding work for other Petitte interests, including welding work on a strip job in Pennsylvania for the Petittes. The record reveals as well that Freeman Welding Service has performed welding work for other independent concerns (all with conceded business relationships with Petitte). More materially and significantly, Freeman had personally contracted with Petitte to refurbish the river tipple for Employer about April 1979. (Since Petitte recalled the job took 2½ months to complete and he otherwise related the refurbished tipple had been in operation for 5-6 months as of hearing, it would appear this work would have been begun some time in April 1979.) Freeman in turn acknowledged that he had an independent business, which is known as Freeman's Welding; and which had supplied Employer, *inter alia* with a welding crew and equipment on oral contract for an agreed price, with Employer purchasing required supplies. The record reveals that on the tipple job, Freeman himself would work (weld) 7 a.m. to 3 p.m. (and weekends) as Freeman Welding, and then on weekdays at 3 p.m. continue in the same work (excepting interruption for other required repairs) on Employer's payroll at his usual hourly rate. Freeman, as Freeman Welding, had also provided extra work to other employees of Employer by employing them on this work on weekends, all with at least Employer's awareness.

was initially laid off on February 24. Heller describes the weighmaster's duties as follows: Essentially his duties included the daily weighing and recording of all coal tonnages that came in by (triaxle) dump truck from individual supply mine sources; and that the daily recording of such coal tonnages as were shipped out to Employer's industrial customers in barges and railroad cars. In regard to such shipments, recordings were regularly made by Heller as to the identity and number of barges arriving, loaded and when plled (leaving) by tugboat, and as well the identity and number of railroad cars similarly received, loaded and pulled. Correlatively Heller's duties involved notifying a tugboat dispatcher in Pittsburgh, Pennsylvania who would arrange for a tug dispatch to pull the barges readied for shipment. According to Heller railroad cars were scheduled for departure on a certain day and routinely readied in advance thereof. In contrast with other unit employees who worked out in the yard or preparation plant, Heller essentially conducted most of his duties at the scalehouse, working at a desk, or standing behind scales. Heller's duties including making entries in two daily forms, *viz.*, a Daily Mine Report and a Daily Report, in which he entered essentially the above coal tonnages received and shipped, and employee (general) attendances, clarifying, however, that he kept such employee attendance records regularly only for the day shift.[17] Heller's additional re-

[17] As described by Employer's Controller Frabutt, examples of which (post April 19) are in evidence, the above reports are a two-page daily record. According to Frabutt, the first page entitled "Daily Mine Report" served as a daily employee status report and an employee personnel file for Employer, in that it listed (generally) the number of man hours worked per shift, any individual absences and reasons, and the Superintendent's time. The second page entitled "Daily Report" is a record of the tonnages which he referenced as being Employer's sole document of coal production received from the mines (apparently excepting actual weigh slips, copies of which Roggish has testified she retained at the scalehouse), and in any event which also served as customer billing

sponsibility was to total up the shift hours that were worked by day shift and forward the same to the office. Heller would receive relevant informational input from Guseman, Casino, or from his personal observation or information supplied to him directly by the employee. Heller testified (I find) credibly that if he had a question as to when an employee had left for the day, he would simply inquire of supervision. While employees would turn in their written excuses for absences to Heller (e.g. from a doctor), Heller testified that he would just (as the form directed) attach and forward them; or in the case of an oral excuse, he would enter notation of the offered excuse when and as advised by the employee. However, Heller testified that he had no authority to approve or disapprove of any absence excuse, nor to reprimand or discipline any employee therefor, but his function was only to note and forward the same to the the office.

Employer's operations also occasionally involved trucking of coal on premises from a hillside processing tipple, in connection with the loading of railcars or barges, or from stock areas. In that connection, Heller would contact certain truckers by phone to provide such services when directed. In that regard, however, Employer maintained telephone file on such truckers for whom Heller would place random calls until Heller had secured the specified number of truckers. However Heller testified that he had no authority to establish rates for Employer at which these truckers were to be paid. It is uncontested that none of these truck drivers were paid for their services when provided as employees of Employer. Moreover, I find on the record before me that they were not employees of Employer but rather independent contractors. Heller also had certain responsibilities in the

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input for the coal tonnages shipped out by rail and barge. Frabutt also testified that these reports were used by him in preparation of cost analysis, e.g., tons (loaded) per man.

testing of coal samples, which involved someone (Heller or another) going out to the yard and obtaining a sample from coal stock. Heller would bring the sample back to the scalehouse; and he would then notify the test lab to pick up the samples for testing. Testing results would be subsequently phoned back to Heller who would then pass the results on to Guseman or the Petittes. However, Heller testified without apparent contradiction (and he is otherwise supported by the record) that it was certain members of Employer's management who determined what coal was to be sampled and tested, and when such was to be done.

Heller normally worked regular day shift hours (7 a.m. to 3 p.m.) though he was given standing instruction by Petitte that he was to work until 5 p.m. when required to handle coal trucks scheduled to arrive later (principally hauling from outside coal producers). Prior to February 24, Heller was paid a salary of $525 biweekly (without overtime) which may be compared also with (admitted) day shift foreman Casino's biweekly salary rate of $1000.[18] Heller has also testified that he (and unlike Roggish who succeeded him as weighmaster on occasion had performed some operator jobs including repair work. Although Petitte has related that Heller had no experience running the plant and loading barges and Heller himself acknowledged that he performed operator work on the belt and repair work infrequently, Heller did testify without convincing contradiction that he did do some operator work or helped operate equipment sometimes (Saturday). In any event, Heller has testified otherwise convincingly, and I find, that he had work-related contact with other unit employees, every day.

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[18] The record does reveal that during a UMW strike in the general coal mining industry which occurred a year earlier, Heller was continued on salary during its duration (as were all salaried employees).

Heller was notified by Petitte that he was to be laid off as of Saturday, February 24. At that time a supply mine which had supplied coal for the processing tipple, was closed. According to Heller, Petitte advised Heller at that time *that it might be 2 weeks or more* before Heller would be hired back; and Petitte told Heller that it would not be held against him if Heller looked for work elsewhere. Heller was the only yard employee of the day and afternoon shift laid off. (There was no third shift working at this time.)

Petitte confirms that in early 1979 he had to shut down the Jasper Coal Company mine for economic reasons and he relates that this condition led him to make certain other changes in his office staff. Thus Petitte testified he released one (of four) office clerical(s) outright and transferred another office clerical, Nikki Roggish, who had prior experience as a weighmaster, to take Heller's place as weighmaster.[19] Petitte's version of Heller's layoff announcement and arrangements made with him at the time was that Petitte approached Heller at the scalehouse and informed Heller that due to market conditions, he was going to have to cut back. According to Petitte, Heller was not surprised as he could see the coal piling up at the time. Petitte told Heller that due to personal reasons, *viz.* that some of the office staff were friends of the family, Petitte was going to have to reshuffle them,

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[19] Roggish had been in the Petittes' employment for 7 years, and only since May 1978 working as a payroll and accounts payable office clerical. Prior to that Roggish had worked as a weighmaster in another Petitte operation. (Heller had thus been more recently employed.) Roggish recalled that it was about the middle of February that Petitte had told Roggish that he was cutting back on the work force; and told her that since she had previously worked as a weighmaster, he wanted her to go down and weigh coal. She recalled that she worked there until Heller (following interim employment in the yard) came back as the weighmaster; and she subsequently came back to work with him only a few days before Heller quit on May 21.

and he was going to have to lay Heller off effective that Saturday, February 24. However, Petitte told Heller that he had done a good job; that Heller *was subject to recall when the market picked up*, which Petitte thought would be in 2-3 weeks; and that Petitte was going to give Heller $300 (which he later increased that afternoon to $500) to tide Heller over. According to Petitte he also told Heller that he would probably give Heller a sizeable increase in salary when he returned, *if the market warranted*, to help make up for money Heller lost. This latter alleged promise of a future compensable loss increase on his return is a matter of major factual dispute by Heller. Thus, although not contesting Petitte's testimony that Heller was given $500 at the time of layoff to tide him over, Heller has testified that Petitte did not at the time specify what job he might be recalled for; and Heller has categorically denied that Petitte had at that time promised Heller a new salary, let alone $1280 when he returned as weighmaster.

After about 5 weeks of layoff, Heller was recalled for employment on March 29 though not as a weighmaster, but for yard work. Whether recalled as a general yardman as such, or as a feeder operator, it is clear that shortly upon his return Heller began running an end loader, working as a feeder operator, performing the same work as had been performed by the recently injured day shift employee, James Fain. For this work Heller was paid at the rate of $5.50 per hour (the same as Fain); and he received overtime. Heller has testified without contradiction, that when foreman Casino notified him of the recall to fill Fain's job, that Heller had inquired of Casino what Heller would do when Fain returned; and that Casino had replied only that they would have to wait and see. Thus Heller asserts that at the time he took the yardman job he actually did not know

if he would be again employed as the weighmaster. However I find such employment was temporary.[20]

Petitte testified without subsequent contradiction that it was about after the third week of Heller's layoff that Heller had started showing up at the yard looking for work. According to Petitte, Guseman and Casino (who had such authority) hired Heller back, without Pettite's prior awareness, to help Heller over a financial crisis. Petitte testified otherwise that he had (always) intended to call Heller back as scaleman.

During her periods of employment as weighmaster, discussed *infra*, Roggish essentially comparably described her duties as weighmaster as follows: Roggish kept daily records of how many hours each employee worked, noting who was off and why, and if they called in. She also prepared the daily tonnage reports. She weighed the coal on incoming trucks, recorded it, and on the following day added the totals up. At the end of the month she turned the records into the main office, keeping, however, a copy of weigh slips at the scalehouse. The office would then pay for the coal bought. Roggish also would call truckers when needed, relating, however, that she decided which truckers to call, though also acknowledging she did so only from a group who had worked for Employer in the past.

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[20] Petitte did not deny Employer motivation existed to fill in for the injured Fain. Guseman did not testify as to this matter; and Casino did not testify at all. I am convinced that Heller was reemployed by Casino, as Heller essentially relates, to do Fain's work until he recovered, though it was no doubt mutually beneficial to him. I conclude that Casino was noncommittal about Heller's future employment because the duration of Fain's absence and future economic conditions were probably not then compatibly discernible to him. I do conclude and find however, on the evidence before me, both that Heller's interim employment in the yard was temporary employment, and that he retained, as earlier informed by Petitte he would have (and confirmed by Petitte), an expectancy of recall from layoff in the position of weighmaster in the reasonably forseeable future.

Roggish also placed calls to determine when and how many barges they were going to get; and she notified the barge gauger when barges were loaded and ready to be pulled. She maintained the barge book which records barge numbers, when in, when out and their gauge. Roggish testified that she also made similar calls in regard to railroad cars availability and maintained certain papers thereon (for her own use) on the railroad cars' numbers and shipment. According to Roggish (unlike Heller), the weighmaster always would know where the barge or railroad car is going; and thus would know to whom the coal is to be shipped.

Since mid-summer Roggish has kept all such records locked in a file unavailable to others (with exception of Casino at night), explaining generally that the work force has no need for them and she does not want them lost or displaced. Unlike Heller, Roggish relates that while serving as weighmaster she has never operated any equipment, shoveled tail pieces, or done any other blue collar work.

Party Contentions and analysis

According to Petitte as of January 1979, in addition to the operational supervisory direction that was provided day shift employees by himself, his brother Jasper Petitte, Superintendent Charles Guseman and (admitted) day shift foreman James Casino, Petitte would additionally have one of the (then) five other day shift employees employed, *viz.*, Richard Heller, also concluded to be a supervisor or part of management, because Heller, as weighmaster, had access to the certain (daily) purchase and sale tonnage information, which Petitte regarded as important to management and thus confidential; and because Heller was in charge of arranging for the coal testing and reporting results to him. In further support Petitte had also related that from his office (200 yards away), he could oversee the yard and that on occasion

when he has observed a problem develop he has had Heller inquire what the problem was and/or has had Heller deliver instructions to the work crew. In its brief Employer additionally argues that the above business information which Heller regularly gathered would be invaluable to the Union in any decision to strike. Employer thus contends that Heller meets the Board's definition of a confidential employee, citing *B. F. Goodrich Co.*, 115 NLRB 722 (1956), in that Heller in collecting such confidential information of the coal yard, assists or acts in a confidential capacity to Petitte who unquestionably formulates, determines, and effectuates management's policies in the field of labor relations. Alternatively Employer contends in brief that Heller should be excluded as a managerial employee because (by work function) Heller was so closely related to management as to place him in position of conflict of interest between Employer and fellow workers; and/or because Heller formulated, and effectuated Employer policies, or had independent discretion thereon, relying on *Illinois State Journal Register, Inc.* v. *N.L.R.B.*, 412 F.2d 37 (7th Cir. 1969). Finally, Employer would alternatively exclude Heller as an office clerical. Employer thus argues that Heller's union card designation made while only temporarily employed in the yard before return to his regular position of weighmaster (an office clerical position) should not be counted. Employer (at hearing) made certain additional arguments as to Heller's contended supervisory position occupied in February resting on certain documents Heller executed in May.

General Counsel would appear to correctly concede on the facts established herein, and in any event, I conclude (on basis of findings made *supra*) that it is proper herein to assess Heller's unit placement only by evaluation of his weighmaster's duties, a position as noted, in which the employer would appear to be in essential agreement. Both General Counsel and the Union reserve that the

same issue is not to be resolved by the weight of (contended) self-serving changes made by Employer in that position after the Union's demand for recognition, Employer's admittedly discriminatory discharge of Heller, and the latter's eventual reemployment.[21]

I first address Employer's urged exclusion of Heller on basis of the claimed confidentiality of his position. The critical consideration for exclusion of an employee as a confidential employee is not whether there is some work contact by the employee touching upon, or even directly involving what may in some business sense be regarded as sensitive business information. Mere access to production records, receiving and shipping information (purchases and sales), or what may be regarded by the Employer in some other business aspect as entailing sensitive

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[21] General Counsel would appear to correctly observe that if Heller's initial recall from layoff be shown to be but one of only temporary assignment to a yardman position (albeit the same be unit included), under existing Board precedent, such would not displace the basic issues of both unit placement and efficacy of Heller's designation of the Union while occupying such temporary position, as nonetheless necessarily to be resolved on the showing to be made of Heller's substantial and continuing community of interest in other unit employees' terms and conditions of employment, by virtue of Heller's (prior and reasonable expectation of recall to) permanent position of weighmaster, *Willett Motor Coach Co.*, 227 NLRB 882 (1977); *Eastern Rock Products, Inc.*, 239 NLRB 892, 893 fn. 5 (1978); and further correctly notes that, *vice versa*, employee Roggish in material times was thus shown only as temporarily employed in Heller's place as weighmaster, indeed with her own (uncontested) anticipated return to her prior permanent position of office clerical. Thus Roggish is to be excluded from the unit as an office clerical; *Honolulu Sporting Goods Co., Ltd.*, 239 NLRB 1277, 1281-82 (1979); *Trustee of the Stevens Institute of Technology*, 222 NLRB 16 (1976). Moreover, to any extent the Union would in effect contend to the contrary in urging that a count of Heller's union representation designation is warranted since made while a yardman, e.g., even if, and as I have found was the case shown, only temporarily so recalled and assigned, I would reject same.

data and/or information, is much too broad a base of disenfranchisement of employees from their collective-bargaining statutory rights, and thus previously held insufficient by itself to render an employee excludable as a confidential employee, *Aeronca, Inc.*, 221 NLRB 326, 330 (1975); *Ohio State Legal Services Association*, 239 NLRB 599 (1978). The critical consideration rather is how the employee operates and functions by assignment for their Employer in relation to a certain kind of sensitive business information, *viz.*, whether it affirmatively appears that the employee performs work in essentially a confidential capacity for a person while the latter is engaged in the exercise of "managerial" functions in the field of labor relations. Cf. *Ernst & Ernst National Warehouse*, 228 NLRB 590, 591 (1977). I can discern no such showing made herein; and I find that Heller as weighmaster possessed no more sensitive business information in performance of his work functions as weighmaster, as have shipping, receiving and other production clerks and indeed office clerical employees heretofore been shown to possess without loss of their statutory rights. I thus conclude and find that Heller while working in (and with expectancy of recall to) weighmaster position prior to April 10, was not employed in a confidential capacity to Petitte, or any other managerial official.

Similarly, managerial status itself is not to be engrafted on truly rank-and-file workers to the detriment of their established statutory rights. Thus even discretionary but essentially routine work performances are to be differentiated. As the Board has stated, managerial status properly is to be "... reserved for those in executive-type positions, those who are closely aligned with management as true representatives of management.", *Lockheed-California Company*, 217 NLRB 573, 574 (1975). Indeed, with Supreme Court approval, the Board has defined managerial employees as those "who formulate, determine, and effectuate an employer's policies." *N.L.R.B.* v.

Bell Aerospace Company, A Division of Textron, Inc., 416 U.S. 267 (1974); *Eastern Camera & Photo Corp.*, 140 NLRB 569, 571 (1963). It is clear on this record that Heller's function in arranging coal sample testing and in relaying test results to management was but perfunctory. I am as well convinced and I find that Heller's contact of the nonemployee independent truckers to perform services for Employer did not involve exercise of managerial skill, but rather involved but a routine phone contact of a preexisting pool of truckers who had previously agreed to provide services to Employer on such call and at rates and conditions set by others. I thus conclude and find that Heller's work activities and functions in relation to both coal sample testing and independent trucker contact were not such as to constitute him a managerial employee in the performance of his duties as weighmaster.

Employer's contentions in regard to office clerical status of the weighmaster are no more persuasive, and need not be belabored, beyond noting that Roggish was selected to temporarily replace Heller not because of her prior performance of office clerical duties, but because Roggish was a long-time employee who had more service, including significant experience in service of Petitte interests as a weighmaster. That she may have additionally also occupied favored position as friend of the Petittes' small family-run operation does not call for a different conclusion.

Apart from arguments based on certain documents (and related action), executed (occurring) post admitted discriminatory discharge, and/or questioned as self-serving, there is no convincing evidence herein of any statutory supervisory power conferral, or exercise by Heller (or Roggish) while working in material times as weighmaster. In that regard it is clear beyond question that Heller in delivering an occasional work direction for Petitte was acting as a conduit of instructions and exercised no independent judgment in the execution or respon-

sibility for completion thereof, as we have seen was quite differently the case with Freeman on afternoon shift working largely in the absence of other supervision and personally looked to by the superintendent to get the work done. That the circumstance, that an employee is salaried, is not the dispositive factor of supervisory status is too long and well established to occasion even need for citation of supporting authority. What emerges clearly from the above is that the weighmaster's duties in this material period were essentially that of a scale operator weighing incoming coal and/or shipping and receiving, or plant clerical, recording certain raw material receipt and production shipment data. In regard to the former the circumstance that Heller would take various action, including, pursuant to instruction, rejection of a defective raw material delivery (only) from an outside source, did not make him any more supervisory in function than would be the case with other receiving clerks who would act similarly in refusing to accept obviously damaged, defective, or unordered supplies for their Employer.

Sufficient showing of community of interest with other unit employees such as to warrant inclusion of the weighmaster position in the unit is clearly made out in employees common supervision; daily work contact; and enjoyment of the same employee benefits, indeed essentially similar work hours. I am thus further wholly convinced, and I conclude and find that the work functions and duties of the weighmaster as depicted above were those of a scaleman with other duties essentially similar to a shipping and receiving clerk and/or plant clerical and thus includable in the production and maintenance unit herein, unless the certain post demand and post (admitted) discriminatory discharge evidence is to be deemed such as to convince nonetheless that Heller, as weighmaster, had earlier occupied a supervisory position. From that remaining issue I momentarily digress (necessarily)

for development of context of the employees' union activity and Employer's alleged unlawful reaction thereto. In passing I would only presently observe that failing such evidence convincing that Heller was earlier a supervisor, the record has established that the Union occupied a collective-bargaining representative status at time of demand on April 19, indeed earlier on April 10.

D. *The Alleged Unfair Labor Practices*

1. The commencement of union activity

Prior to February 19, Clifford Bonnett had served as recording secretary and/or an officer of the Local Union for 15 years, and was employed by Christopher Coal Company, a Division of Consolidated [sic] Coal Company, as a pilot operating the tugboat Donna Lee on the afternoon shift (4 p.m. to 12). (Bowman, Sr. worked the tugboat in that period, normally on the night shift (12 to 8 a.m.) but occasionally on the afternoon shift.) On February 19 Bonnett resigned his positions to become an Organizer employed by the International Union from February 19 until he resigned that position to return to his prior employment on the tugboat on June 15, but he has not returned to present holding of any Local Union office. Leonize "Dutch" Morris became employed as an International Organizer also on February 19, and he has remained such to date.

Bonnett recalled it as being one evening in late January or early February that Freeman had visited the Donna Lee with a request for some tugboat assistance, and that while there Freeman spoke with Bonnett about the Union. Bonnett's version is that Freeman mentioned his understanding that Bonnett was going to become an organizer for the International Union. Bonnett replied he might do so. According to Bonnett, Freeman asked Bonnett to come down and organize Employer's employees first. Bonnett replied he would try to do so. Bonnett testified that he didn't know Freeman to be a foreman at the time,

but "like a pusher." Bonnett asked Freeman on that occasion to give him a list of the names of Employer's employees and their phone numbers; and that Freeman had at the time promised Bonnett that he would. Freeman admits visits to the tugboat (with Bowman) but denies that he asked Bonnett to organize Employer's employees; and his version is that employee Bowman was with him at the time and that they were "razzed" for being non-union. Morris testified that on February 23, both he and Bonnett had traveled together to attend an orientation program arranged by the International Union for its new organizers; and he recalled that Bonnett had mentioned to him on that occasion that afterwards they were going to go to Employer first, because of the conversation he had with Freeman.

Bonnett testified that after he became an organizer he called Freeman on the phone and notified Freeman that he had become an organizer and inquired of Freeman whether Freeman had gotten the list for him. Freeman said he hadn't, but he would, as soon as he could get up to the office. Bonnett relates that Freeman never thereafter supplied a list; and that he did not call Freeman again, because he figured that Freeman wasn't going to get it for him. However Bonnett, when specifically questioned, related that he had made such call to Freeman at the end of *March*. Freeman does not deny a Bonnett contact about a list of names, addresses and phone numbers. Thus Freeman confirmed that Bonnett, at a time that Bonnett was known by Freeman to have become an organizer, thus necessarily after February 19, had contacted Freeman at his home to get a list of names, etc., of employees. What is in issue is not whether Freeman came to know that an active union campaign was underway, but when he first did know of it; and its effect.

Morris testified that he had assisted Bonnett in the organizing of Employer's employees; and he would place the start of the campaign at the end of *February*, rather

than the end of March. Notably, however, he described the start of their organizational efforts as with but *some* names and it being *after* Bonnett had contacted Freeman. Morris thus has testified (generally) that after Bonnett talked to Freeman, they got some names; that he, around February 27-28, started visiting and talking to employees at their homes, at bars and churches; and that, as they went along, they got the names of all the employees. Morris also testified that eventually he had talked to all the employees; that he found seven of the nine employees (that he had calculated were in the unit) were agreeable to the Union; and thereafter the union representatives obtained and witnessed six authorization cards signed by employees who designated the Union as their collective-bargaining representative. The union cards were obtained from employees at their individual homes on April 9, 10 and 11. (In the referenced six cards signed, Morris has included the card of Long, the only one signed on April 11.) As is found materially significant herein, Morris testified that a seventh employee who had earlier also favored the Union was James Fain, who had been at this time shot and hospitalized.

Thus, aside from dates, in summary and essentially, the Union's organizational movement took the form of various successive individual contacts with employees, in which the Union ascertained the identity of unit employees, explained the Union to the employees; first explored with employees those in favor of the Union; and then obtained in a few days from individual employees at their home majority designation evidenced by authorization cards signed in the second week of April, *viz.*, on April 19 (Bowman) and April 10 (Heller, Roberson, Trippitt and Eddy). The only seeming appearance of inconsistency bears limitedly on when the organizational efforts started, viz the end of February as Morris specifically recalled though in circumstances suggesive being after a Bonnett-Freeman contact, or the end of March, as

Bonnett at least on one occasion stated was the time of his sole followup contact with Freeman. Bowman, Heller, Trippitt and Eddy have confirmed their union card signatures on those respective dates under circumstances I find conclusive of their validity; and Roberson, called as a witness by Employer has not denied same. The validity of the card designations on those dates is not in any sense in question, but Freeman's contact as to an actual campaign undertaking, and Employer's first awareness of the union activity of its employees is the issue, as it bears upon certain wage increases granted in early April.

2. The April wage increases

The record reveals that day shift machine operator Howard Tennant received a 25-cent wage increase, and that afternoon shift plant operator Kenneth Roberson, and Freeman had each first received a 50-cent wage increase, all being made effective April *4*. The remaining employees received wage increases effective April *18* as follows:

Day Shift [22]		Afternoon Shift	
Willard Eddy	.25	Charles Trippitt	.50
Dennis Ingersoll	.35	Earl Bowman	.50
William Elliott	.25		
James Fain	1.50		

Bowman testified that the afternoon shift received their raises on April 10. Thus Bowman relates that they were called to the scalehouse. Petitte and Freeman were there. Petitte told them it was time for a raise, saying he thought we deserved one. They then went to the supply room where Petitte had a paper with names of the employees and what they were making. Bowman then at $5.75 received a 50-cent raise to $6.25. Petitte said

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[22] Richard E. Heller returning to employment under special circumstances to be described *infra*, is shown as receiving a biweekly salary of *$590.77*, also effective April 18.

the raise would go into effect the following pay period (and payroll shows it effective 4-18). Bowman testified that in that respect this increase was implemented differently from his last raise received which had been put into effect immediately. Trippitt confirmed that on April 10 when he went to work Freeman told him that there was to be a meeting of employees in the scalehouse. When Trippitt arrived he found other afternoon shift employees (Bowman and Roberson) were also there, as was Petitte. Petitte showed Trippitt his raise on a piece of paper; and he told Trippitt that he wouldn't get it this coming payday, but it would be in the following payday. Trippitt also was raised 50-cent, from $5.75, to $6.25.[23] (It appears Trippitt would have already signed his authorization card.) Day shift employee Eddy relates that it was not until April 11 at 9:30 a.m., that Petitte had come down to the river and informed Eddy that he had put Eddy in for a raise. Eddy asked how much and was told 25-cent [sic]. Eddy asked when (effective), and was also told by Petitte that it would not be in this paycheck. (Eddy was raised from $6.75 to $7.00, effective April 18.) According to Eddy, Petitte also told him if things went good or continued to go as well as they were then, Eddy would receive another raise in 6-8 months. (Eddy first employed in 1974, testified that he had received several raises prior to this time, the last such being received but 2-3 months earlier.) On the day previous, April 10, after work, Eddy had signed his authorization card for the Union.

3. The alleged earlier interrogation and threats by Freeman

Trippitt relates that he had a conversation with Freeman earlier about the Union which Trippitt would place

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[23] Trippitt related that he also believed that Petitte at the time had said he didn't know why he decided to give us a raise, but he did. In my view the remark, even if spoken as recalled, is too cryptic to be of significance.

about the end of March; though it is noted in passing that the record has revealed some unreliability in Trippitt in recalling dates. According to Trippitt's recollection otherwise, Freeman had spoken to Trippitt in the basement of the plant, and asked Trippitt if he had signed a union card. Trippitt answered no. Freeman then told Trippitt that there would be no union; that he might as well forget it; and that the Petittes, or the Petitte Brothers, would put their hardhats on and run the place themselves, they had put them on before and would do them (sic it) again.[24] Bowman also testified that it was a few days before he had signed his card on April 9, that Freeman informed Bowman that Freeman had told Superintendent Guseman that the union organizer had been around talking to the men. According to Bowman it was (some time) later that he told Freeman that he signed a card. Significantly Bowman also testified that it was a day or so after he had signed the union card, and at quitting time at the plant, while waiting for Roberson to finish, that Freeman had told Bowman *and* Trippitt that they might just as well forget about the Union because the Petittes were going to put their hardhats on themselves and run the business; and that Freeman told him that before the Petittes went union, they would put their own hardhats on and run it themselves.

Freeman's version was that he thought it was April 10 but otherwise confirmed that he had told both Trippitt and Bowman that they just may as well forget this union, as the Petittes would just put on their hardhats and "toes" and go back to work, if worse got to worse. However, Freeman denies that he was instructed to do so by

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[24] Employer also established that in prior statement obtained by the Union, Trippitt had referred to Jasper Petitte as having been said to have made the above statement, but at hearing Trippitt related his recollection was, and maintained his testimony that Freeman had stated it more generally as the Petittes, or the Petitte brothers. In view of Bowman's corroboration the variance is not significant.

Employer. Freeman also confirmed that Earl Bowman in April had told Freeman that he had signed a card; and he testified that he later told Guseman in the shower house that he had heard talk about the Union, that the men were trying to organize. Freeman has Guseman reply it wasn't the first time, but that he had then inquired what made Freeman think that. Freeman then told Guseman that Bowman had signed a card. Freeman testified that the next day, which he recalls as April 12, he repeated the information to Jasper Petitte. Thus Freeman would have his notice to Guseman of employees' union activities given only after all the wage increases were announced. However Bowman, a credible witness, testified that Freeman had already, a few days before April 9, told Guseman that the union organizer had been around talking to the men. Moreover, this record reveals that Freeman had initially testified that he had only first learned of the union activity in April *after* the employees were fired; and it was only after reflection overnight that he then related he recalled he first found out in February; and then otherwise testified *inter alia*, as above noted, including that Bonnett had earlier asked him for a list of names, etc., and his conversation with the employees, Guseman and Jasper Petitte. Under these circumstances Freeman's relations as to his first awareness and contact with the Union must be concluded to have been simply something less than initially candid, and his other denials and account appear much the more questionable. I credit Bowman that Freeman told Bowman earlier that he had alerted Guseman of union activity prior to the announced April 10 wages, though it would appear after the April 4 wages were effective. However I am convinced by the above circumstances, and in the light of subsequent events, that it was late on April 10 (thus after raises were announced), that Freeman told *both* Trippitt and Bowman in substance and effect that they should forget the Union; and also that it is more probable than not that it was on that

occasion that Bowman told Freeman he had already signed a card for the Union, and Trippitt asked if he had.

4. Employer's offered explanation

a. *The increases granted were but a normal annual increase keyed to union operation increases.*

David Frabutt, a West Virginia CPA, has been employed as Controller for Maidsville Coal since March 1977. Though paid by Employer, he does work for the Petitte brothers' related companies as well, including Petitte Brothers Mining Co., Inc., a union mine operation owned by Johnny and Jasper Petitte (and one other individual), and Electra Fuels, Inc., a wholly-owned subsidiary of Employer, which operates a *non*union mine. Frabutt's responsibilities include preparation of financial statements and corporate returns; and he testified that he is also involved in wage discussions for employees of the above companies. An annual raise (as Frabutt described it) was granted to Employer's employees in November 1977. It was Frabutt's further understanding that there was a general policy to try to give annual raises at the nonunion operations when union operations received one. In that connection, a UMW strike occurred shortly thereafter, on December 7, 1977 and lasted until March 28, 1978, at which time a new BCOA agreement was reached between the UMW and coal producers, with certain raises being received by contractually covered employees in March, 1978, and thus at the Petitte Brothers (union) operations. Frabutt testified however, that it was financially impossible at that time for Employer to give its tipple employees a raise in March, 1978, but that it did subsequently grant an across-the-board raise to them May 24, 1978.[25] There was no further raise granted that year.

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[25] Employer had operated until December 15, 1977 at which time its hourly work force was essentially laid off until the completion

In 1979 the BCOA's next contractual date for a raise was (apparently) again the end of March. It appears uncontested of record that Electra Fuels' employers received at least a partial wage increase the first week of April.[26] In any event Frabutt's recollection was that there were further discussions on April 10 for raises for Employer's employees; that it was on April 11 that the employees were formally notified that they were to receive raises; and that their raise was to be effective April 18. However, Frabutt has elsewhere testified that there were even earlier wage discussions, and it was during such wage discussions carried on 4 days before April 12 (thus April 8 or 9) that he first found out that Guseman had already raised three employees of Employer, with grants effective April 4. (Mechanically, such raises would be put in relatively simply by telling payroll clerk Cyzick the new rates to be applied.)

The record, in its entirety, will simply not support Employer's contention that Employer has regularly granted annual raises, or at the time union operations received them; and at best indicates that timing of increases received by union operations were a factor considered. Employees testified that they had never heard of an annual wage increase; that they knew of no set time for their raises; that the Superintendent or foreman would just put the employee in for a raise, and it came in the next paycheck; and there are individual instances of such evidence in the record. Indeed Frabutt has conceded as

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of the strike, returning to work on March 28, 1978. Frabutt relates that Employer's two superintendents (whom he identified as Guseman and Heller) in the interim had continued on salary *and* had acted as guards visiting the tipple. However, Guseman couldn't recall ever seeing Heller at the tipple during the strike and I am convinced that Frabutt is in error in the latter respect.

[26] A certain amount of the anticipated increase was earmarked for improvement of benefits which took place in the future, discussed *infra*.

much in testifying that it (e.g., an annual wage increase keyed to time of union wage increase) was not a formal written policy; acknowledged that supervisors were not told of it; admitted that Employer was not tied to it; and eventually and significantly has testified that both wage increase grant and amount was (always) up to Johnny Petitte.

Frabutt also testified that they were perplexed over the three earlier wage increases granted by Guseman; having been given prior to the time when an asserted (annual) increase would be up for consideration; testified that he would have believed that Guseman did not have authority to do so, without Petitte's knowledge; and that he did not know why Guseman did not first talk it over with Petitte. According to Frabutt there was no discussion of the Union in *his* discussions about wage increases; and he relates his first awareness of employee union activity was shortly before he read the Union's demand letter of April 19, thus clearly later than Guseman and Petitte knew of it.

b. *Claimed existence of a standard wage for plant operator; and individual action by Guseman as to the first three wages.*

Freeman has testified that in February he had asked for a raise, and that subsequently he, Tennant (day shift) and Roberson (afternoon shift) received one, effective April 4. Roberson testified only generally that he normally would ask Guseman for a raise; but also that he mentioned to Freeman that he was due for a raise, or something to that effect, because Freeman was in the chain of command. Tennant did not testify.

In explaining his wage increase grant to Roberson, Guseman asserted that there was a standard wage for plant operator; and that Freeman came to Guseman on several occasions with Roberson (who had been operating the plant for some time) and stated that Roberson had been

asking when he was going to be brought up to standard wage.[27] Guseman relates that Freeman and Tennant had also asked him on several occassions for a raise. According to Guseman he simply decided to give them a raise at this time. Guseman has further asserted that he did so, on his own, without consulting Petitte, though he also acknowledged that was unusual; indeed, on this record, not shown done theretofore. In what must be deemed equally unusual, Guseman could not even recall whether (or not) Petitte was upset when Petitte found out about the raises he had granted to Freeman, Roberson and Tennant. Day shift plant operator Dennis Ingersoll, hired April 9, 1977, prior to last increase granted, was paid at the rate of $7.50 as compared with the $6.25 of Roberson who was hired April 25, 1977. Roberson made no claim to a standard operator rate. More significantly Employer has introduced no records to establish there was any such standard (with or without progression) rate for plant operator. Indeed the only such records made available, if anything, would indicate Roberson has recently obtained to $6.25 on "1-24-79." In any event, I find Guseman's assertion as to Roberson's increase as one designed to bring him up to a standard plant operator rate is simply not shown supported in the record; and Freeman's testimony on when granted, inconsistent.

c. *Petitte's response to Freeman's report that employees had learned of earlier raises given.*

Petitte testified that Freeman, Roberson and Tennant were granted raises by Guseman without even his awareness until April 10. According to Petitte, it was on that day that Freeman approached Petitte and told him that the other men had heard of the raises that Freeman, Roberson and Tennant had received and were wanting to know if they also could get a raise (denied by Freeman);

[27] Guseman could not recall Roberson ever asking him for a raise directly.

and that Freeman also told him that it had been a while since the men had last received a raise, that everyone in the hollow [28] had got a raise and that the rest of the men were kind of looking forward to it. Petitte told Freeman he did not forsee any problem. According to Petitte he promptly went to the records; determined what the men were then making; decided the raise to be given to each man; and notified them between April 10 and 12 as he saw them on the property. Petitte testified (with corroboration by Guseman) that the grant of wage increase by Guseman was within his authority, and he did not reprimand Guseman for giving the above three men a raise earlier. Petitte acknowledged that as Employer's president he would want to know, and would have been upset if Guseman (and Casino) had known about union activity at the time and didn't tell him, but that he did not believe that they knew about it. Petitte categorically has denied that he himself, had any knowledge that union cards were being solicited, or a union campaign was going on at Employer at this time; and otherwise testified that other than as to the men recently raised by Guseman, it was a year since the men had received their last raise. In that regard Petitte did confirm that Employer did not have a set rule that it went by, but that normally when their union mines got a pay raise, they would raise their nonunion operations. Petitte relates that they had given a raise to the men at their (nonunion) mine at this time. Petitte asserts that he paid wages to the men in his nonunion mine that were higher than provided for by the Union's (BCOA) agreement; and candidly, that he did so, *inter alia*, to keep the Union out. In testifying categorically that he had no inkling that a union organization campaign was going on at Employer, Petitte asserted that

[28] In Robins Run Hollow there are apparently three to five independent operations. Petitte testified without contradiction that it was common knowledge that March-April was time for raises; that most were receiving raises; and that in a small mining town news of raises travels fast.

had he known: "I would have increased their wages probably fifteen or twenty percent and I would have probably raised the hourly rate a minimum of a dollar and a half to two dollars"; and specifically do so "to prevent the Union from coming in."

Bowman testified that on April 12 Petitte came up to him as he was cleaning belt lines. Petitte asked if Dutch Myers (Morris) had been around his house. Bowman replied yes. Petitte asked what he had told Morris. Bowman said he had told Morris to get to hell out of his house. Petitte then told Bowman that they would get a raise during the summer, if work picked up. According to Bowman, in the same conversation, Petitte also told him that he couldn't afford the Union, that he would just lay us all off, and he would run the place himself; and that Petitte told Bowman to keep (tell) his father to stay away, that he thought that was where the union problem was coming from.

According to Petitte he had first found out about union activity earlier in the afternoon of April 12 through receiving a message from a hospitalized employee delivered to him by an independent trucker.[29] The message was that union organizer Morris had been to Fain's hospital room on several occasions trying to get Fain to unionize. Fain, who had been with the Company for years in different capacities, was apparently last hired October 2, 1978, received his first raise in April. Previously the lowest paid employee, as noted, Fain received a $1.50 raise, effective April 18.

Petitte has testified that he was infuriated, or as he rethought later extremely upset, to learn, only a day or two after giving the men raises, that they had launched a campaign to unionize him. Petitte testifies that his first

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[29] The hospitalized employee, James Fain, allegedly shot during a dispute with his wife, had last worked Friday, March 23. The trucker did not testify.

reaction then was for revenge, specifically to fire the men involved.

Petitte relates that he had received reports from his employees as much as some 4-5 years earlier that Eddy was union-oriented and had wanted to organize Employer's tipple. More recently there was occasion when Eddy had been escorted off the property in regard to drinking, though without subsequent reprimand. In any event, Petitte acknowledged that he felt sure Eddy would be involved in the union organization up to the hilt; and that number two would be Bowman.

Thus Petitte relates that he also knew through rumor that Bowman and his family were union. Petitte confirms that he spoke to Bowman on the afternoon of April 12, and acknowledged that he was at the time trying to pick out the people involved.[30] Essentially Petitte's testimony as to this conversation has either confirmed, or does not effectively dispute Bowman's account. Thus Petitte relates that he told Bowman that he was having some problems with the men, that he wanted to resolve it as best he could; that he knew Bowman's father had been down there doing his work; and Petitte told Bowman that he didn't want anymore of it; expressing other stated reasons, all of which I do not find convincing under the circumstances of earlier inaction.[31]

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[30] Petitte has also testified, though in other context, that he eats at a local restaurant at which men from the (organized) tug Donna Lee also eat; and he had been hearing rumors *in March* there that some of the union men who worked the docks at Consolidated [sic] Coal were raising hell because when they needed the tug (Donna Lee) it was down at a scab operation; and had heard that if it didn't stop they were going to go over the boat's captain (understood by Petitte to be Bowman, Sr.) to Consolidated [sic] Coal's officials.

[31] Petitte otherwise related he explained to Bowman that they were abusing the relationship by having his dad down there every night placing barges; that it wasn't necessary as for years they had handled barges by power wench, that Bowman wasn't doing his

More materially Petitte, although relating that he didn't believe he had asked Bowman if Morris had been to Bowman's home, has testified that he believed he did tell Bowman that he heard a rumor at this time that Consolidated (men) wanted to come down and organize them; and although he didn't believe so, he couldn't say for sure that Morris' name came up. Petitte relates that he also told Bowman that they had enough problems without having someone down there trying to organize us from Consolidated Coal. Although Petitte initially asserted that he did not recall a discussion of a further raise with Bowman at that time, thinking he had told it to Bowman earlier on April 10, Petitte also stated that it was quite possible he had told Bowman that he would get a raise in the summer or when work picked up. Finally, it is observed that although Petitte said he couldn't remember it, he also testified that he was not going to deny that he told Bowman that the Company couldn't afford the Union; or that he would run the place himself; or might have to lay somebody off if the Union got in, and testified if Bowman was quoting him, it's quite possible he said it. In view of the above admissions and/or non-denials, I credit Bowman. Accordingly, I find that Employer through the acts and conduct of its President Petitte on April 12 has engaged in unlawful interrogation of its employees as to their union activities, sympathies and desires; has coerced

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own work; that Petitte was afraid someone would get hurt on the tug and they would all be in hot water. Bowman responded that his dad was only trying to help them and him out. Petitte replied he understood that but that he didn't want him down there, that he didn't think it was right that his father was down there doing Bowman's work; that he didn't want him down there because an emergency might arise where they needed him, and (then) they would not be able to get him. However the fact is that Petitte new [sic] about the situation in *March*, and that there was local union unrest over it, but Petitte did nothing about altering the practice at that time. Even more significantly, on one occasion, Petitte did relate the rumor he had heard was that they wanted to come down and organize the plant.

employees with statements of threatened layoff of employees if the Union got in; and promised future wage increases to employees in order to dissuade them from the Union all in violation of Section 8(a)(1) of the Act, as alleged in complaint.

Petitte has offered in explanation of the $1.50 increase given to Fain, that he did so because he felt sorry for Fain, who was a hard worker; and Petitte has also noted that Bowman had previously received a comparable $1 raise when Bowman was reviewed after his initial hire. However this record is also clear by concession of Petitte, that, unlike Bowman a *new* employee, started low, who turned out to be an excellent worker, Fain was an old and intermittent employee; one "in and out of more trouble than 50 people"; when last employed, had previously been the lowest paid employee, but received three times the amount of raise of any of the others received at this time from Petitte's evaluation; had (apparently) reported the campaign to Petitte; and finally the amount granted Fain, significantly corresponded to what Petitte otherwise has admitted he would do with raise grants to employees had he earlier become aware of the union activity. I am thus wholly convinced, that at least in amount granted employee Fain, Petitte was clearly motivated in part by antiunion considerations, and I find that such grant was as clearly in violation of Section 8(a)(1). Nor is the significance of the likely effect of same on Fain's subsequent vote against the Union on April 23 (discussed *infra*), one to be overlooked in that context.

The complaint has also alleged that certain interrogations and threats by Freeman in early April (of date uncertain) were also violative of Section 8(a)(1) of the Act. Employer has essentially defended that Freeman was not a supervisor at the time but a leadman, a defense which I have earlier found nonmeritorious. Charging Party argues that the questioning and coercive remarks of Freeman to employees are imputable to Employer

with the determination made that he is a supervisor, relying on *Jays Foods, Inc. v. N.L.R.B.*, 573 F.2d 438, 445 (7th Cir. 1978). Therein it was also explicitly held that the possibility that the Company may not have known of a supervisor's questioning did not free the Company of responsibility for his actions. However that case did not, as found to be present here, involve a supervisor who had his own earlier contact and some involvement with the Union, known to employees (e.g. Bowman, and with whom Bowman had, to a degree, confided). It is initially observed that the Board has not heretofore determined the supervisory status of Freeman; and I have now found herein that Freeman in fact did occupy such status during material times. The Board has previously held that employers must generally accept responsibility for the conduct of foremen having supervisory status, *Glenroy Construction Co., Inc.*, 215 NLRB 866, 867 (1974). I have further found the facts to be that Freeman did interrogate Trippitt as to whether he had signed a card; and that Freeman did coercively tell employees Bowman and Trippitt, probably at the end of their shift, about 11 p.m., on April 10, in substance and effect, to forget their interest in the Union, because the Petittes would run the business themselves before they would accept the Union as employees' representative. The only further question raised by the above facts herein found relevant to these complaint allegations would appear to be whether Freeman's earlier involvement in contacts with the Union and/or his understood relationship to employees was such a circumstance as to preclude the required conclusion that his acts in those respects would reasonably tend to restrain and coerce employees. See and compare *Montgomery Ward & Co., Incorporated*, 115 NLRB 645, 647 (1956), enf'd. 242 F.2d 497 (2nd Cir. 1957). It appears neither the limited extent of Freeman's involved contact with the Union such as has been found herein, nor his relationship (or assumed friendliness) with employees constitutes excepting circumstances such that the

Board would not hold the employer responsible for such antitunion conduct of the supervisor.[32] I would only further note that the employees herein in fact looked upon Freeman as their foreman. Accordingly, I further conclude and find that by the above conduct of Freeman, Employer has additionally violated Section 8(a)(1) of the Act, cf. *Wolverine World Wide, Inc.*, 243 NLRB No. 72 (1979); *Daniel Construction Company, A Division of Daniel International Corporation*, 241 NLRB No. 50 (1979).

The remaining issues in regard to the certain raises granted and made effective on April 4, and April 18, may now be considered. Even without antiunion consideration, a "well timed" benevolent grant of a wage increase to employees in the midst of an employee union organizational campaign constitutes an unlawful employer interference in violation of Section 8(a)(1) of the Act, *N.L.R.B v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964). Whatever pragmatic reservation may arise in the plausibility of attributing specific knowledge to Employer of the occasion of Bonnett's campaign opening in the form of the personal followup request made of Freeman for a list of employees, there is no such cause for reservation with regard to Superintendent Guseman as to the latter's awareness of the advent of union activity provided by Freeman's more limited general report that a union organizer was then actively contacting Employer's employees. Guseman has not denied receiving such a report from Freeman; and the same is, I have found, credibly evidenced as occurring (at least) a few days before April

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[32] It is to be noted that in any event the Board has held, even in instance of warranted exemption from unfair labor practice finding, that the Employer is chargeable with knowledge of union activities acquired by such a supervisor; and that the supervisor's statements to employees are admissible as evidence of his employer's motivation in discharging individuals, *Montgomery Ward, supra, id.* 647.

9.[33] To be sure I am persuaded by the conviction of certain of Petitte's testimony, and its plausibility in the light of the weight of the record evidence before me, to conclude that Petitte probably did not specifically know at the time he announced raises (beginning on April 10) that certain of his employees had already signed cards for the Union (commencing the day before). However I have the gravest reservation in full acceptance of his other urging that he was not aware at all of a union campaign at this time, given his own admission that he was aware in March (thus at least by the end of March), that there was local union unrest over Employer's non-union operation's use of the unionized tugboat; other timely rumors; and the established awareness, not only of Freeman, but even more significantly of Superintendent Guseman of the specific fact that a union organizer was then actively contacting the Employer's employees, prior to the announced grant of increases on April 10.

Nor in my view has Employer advanced cohesive or persuasive explanations for the timing of the announced grant of wage increases to employees otherwise at this time. Rather, the strained compatibility of record fact with Employer's assertions of merely following policy of claimed annual raise, and/or one keyed to timing of area union raises as initially asserted and then substantially defaulted by Frabutt, together with the inconsistencies of past practice evidenced thereon related above, and in the record otherwise; the lack of prior awareness of same by employees and supervisors alike; and the incongruity of a claimed initial review of wages by Petitte on April 10 as a result of Freeman report of employee concern over earlier raise unusually granted to but three individuals, under circumstances that participants have either reported divergently or denied, and as compared with recollection of Frabutt to wage discussions held even a day or

[33] This finding is based on credited testimony of Bowman, and fair inference therefrom and from Guseman's lack of denial.

two earlier, sufficiently demonstrate, in my view both reason for rejection and cause to look elsewhere for purpose. In passing I would only add that even a mere advancement of raise increases (e.g. from May to April) *in the above circumstances* would be no less unlawful; nor does even the consideration of an announcement of similar (partial) wage increases as much as a week earlier (in April) at the nonunion mine warrant different conclusion, where it is conceded it also was carried out, *inter alia*, to keep the Union out. Accordingly, I conclude and find that by announcing the wage increases to Employer's employees on April 10 and at a time when the Employer knew a union organizer was actively contacting its employees, Employer has interfered with the Section 7 rights of its employees in violation of Section 8(a)(1) of the Act, as alleged in the Complaint, *Honolulu Sporting Goods Co.*, 239 NLRB 1277, 1280 (1979); *Montgomery Ward & Co., Incorporated*, 220 NLRB 373 (1975), enf'd. 554 F2d 996 (10th Cir. 1977).[34]

5. The termination and reemployment of employees Earl Bowman, Willard Eddy, Charles Trippitt and Richard Heller.

a. *The discharges*

Petitte did not think he spoke to other employees on April 12, after Bowman; but he did discuss the situation further that afternoon with brother Jasper Petitte, to whom

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[34] Having so found and concluded, I further conclude that I need not reach or resolve whether the additional observed inconsistencies as to indicated unusual earlier grant of wage increase by Guseman to three employees (though made effective April 4), in the additional light of his own guarded testimony in not recalling the timing of same but in relationship to other employee raises relating: "I'd like to say a couple of weeks, but I'm not too sure about that.", is, merely to be regarded as rendered suspicious, or itself risen to level to warrant still further unfair labor practice finding therein.

it will be recalled that Freeman reported on April 12, *inter alia*, that Bowman had signed a card. At hearing Employer made major admission that it had discharged the four above-named employees for discriminatory reason. Thus, Petitte has acknowledged that on the afternoon of April 12, they decided to fire four men, and did so primarily because Petitte believed they were union supporters, and were where the Union would concentrate its effort.[35] Thus, in addition to the suspected Eddy and Bowman, employees Heller and Trippitt were also selected for discharge.[36] Petitte thereupon typed up individual discharge letters for these four employees, placed them in separate envelopes with name of respective employee, and left them in the filing cabinet at the scalehouse. Two employees were notified Friday, April 13. Petitte did not recall if Freeman gave them out (but Freeman did to Bowman and Trippitt).

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[35] Petitte explains he hadn't consulted a lawyer and didn't take legality or illegality of the action into consideration at the time, nor consider there would be any legal repercussions, but decided to fire the four employees and just felt that was the end of it. The Union, in its brief, while acknowledging the same as an exceedingly damaging admission, nonetheless argues that such is not indication that Petitte is an otherwise credible witness; but (for asserted reasons) Petitte has admitted only what he could not conceivably deny. In evaluating Petitte's testimony I have taken both arguments into account.

[36] Petitte testified that he felt Heller would also probably be prounion because he was a close friend of Eddy, and Eddy would influence him to be; and also because Heller had been "laid off to begin with, just let go" and (he felt) would do anything to hurt Petitte. However, also revealingly, Petitte asserted as further reason that Heller (had) had access to confidential information and Petitte didn't want him to anymore. (At the time Heller, working in the yard had no such access, but later he did, when returned as weighmaster.) Trippitt was suspected by Jasper Petitte, because though a brother-in-law of the latter's son, Trippitt had been recently "reamed out" by Jasper over an incident involving alleged misleading of the son; and Jasper Petitte concluded that Trippitt would go against them for spite or revenge and probably go union.

On the following day, April 13 (Friday), at quitting time, Freeman told Bowman and Trippitt to follow him to the scalehouse. They first went to the supply room; and Freeman then went inside the scaleroom, opened the file cabinet, and withdrew two letters, handing them to Bowman and Trippitt. Bowman's letter, in evidence reads:

> This notice is to inform you that due to poor market conditions there will be a general cutback in personnel and labor force. Termination of your job is to be effective immediately as of 4-13-1979.
>
> Management,
> Jasper Petitte

After Bowman had read his letter, he said to Freeman, you know what this was for. Freeman replied, "I figure, but I don't know for sure." Bowman said it was due to the Union. Freeman said if they needed any references to contact him, and he would give it.

Trippitt confirms that Freeman called him to the office at 11 p.m. and that he was terminated on a Friday night, only 3 or 4 days after he received the last raise. Freeman received the same "general cutback" notice as did Bowman. Although not corroborated, as Bowman could not recall what Trippitt said, Trippitt testified credibly he told Freeman that it seems like its kind of silly for us to get a raise 3 days ago and get laid off today. Freeman replied, I don't know, I talked to them for over an hour, and they still wanted me to give you this letter. Freeman also said that they said he (Freeman) might not even have a job. Trippitt also testified that there had not been a third shift before, but one was established after they returned to work on April 23, which shift is still in place; and he otherwise confirmed that Freeman offered, if Trippitt needed a reference for another job, Trippitt could call Freeman.

Eddy relates that he received his termination letter on April 14 (Saturday) while working on a garden tiller (at a neighbor's home). Guseman drove up and handed Eddy an envelope. Eddy asked what it was. Guseman said I guess its your walking papers; saying to Eddy not to hold it against him, he was just doing his job; and then Guseman drove away. Eddy's letter of termination was somewhat different from the basic "general cutback" letter received by Bowman and Trippitt. It provided:

> This notice is to inform you that due to poor market conditions, lack of responsibility, unexcusable missing of work, drink of alcoholic beverages and coming on company property, I feel that you have endangered the safety of our men and therefore must be terminated immediately.
>
> Effective 4-13-79
>
> Management
> Jasper Petitte

Eddy's missing of work (for a previously planned hunting trip) at Thanksgiving and suspension for 3 days has been earlier noted. With regard to the referenced drinking Eddy related that about 1½ months before then, he had finished work, gone home, eaten and had a few beers, and returned to the job. Eddy explained he had returned to see if Bowman wanted help with a leaking barge. He relates Guseman was there; and had asked what he was doing there. Eddy told Guseman, who said nothing in return. Eddy then spoke to Bowman and left. Guseman confirmed the incident, could not recall the details, but significantly testified he made no recommendation that Eddy be fired. Eddy testified that he otherwise only drank on premises when others had done so viz., the superintendent, foreman, truck drivers and other employees. Superintendent Guseman confirmed even this generally, viz., that in the past, the supervisor(s) and the men would break open a case of beer when shift was over, or on the

weekend. Otherwise Eddy explained the referenced absences as being occasioned because he was also problemed with an apparently work-related back injury at the time while working 6 days a week, and would have to take a day off once in a while. He admitted that Guseman had spoken to him orally, telling Eddy that he wanted to see Eddy there 5 days a week, but that he wouldn't thereafter have to work on Saturdays. The asserted additional reasons for discharge of Eddy, under all the circumstances, were clearly pretextual.

Heller testified that the last day he had worked was Friday, April 13, but that it was actually on April 15 (Easter Sunday) that William Harmon (a friend of Heller) came by Heller's home and advised him that Foreman Casino was outside and wanted to see Heller. Heller went outside. Casino then handed Heller an envelope with Heller's name on it; and Casino stated, that Heller was not to blame Casino, as Casino did not have anything to do with it. Heller inquired what Casino was talking about, and Casino told Heller to open the letter. When Heller did so, he found the same "general cutback" letter of termination and a final paycheck.

On the basis of the above evidence and the admissions of Petitte, I readily conclude and find that Employer has discriminatorily discharged employees Bowman, Eddy, Trippitt and Heller in violation of Sections 8(a)(3) and (1) of the Act.

b. *The Union's intervening demand for recognition*

Petitte confirms (Morris and Bonnett) that on April 19, the union representatives came to his office and presented him with their demand letter requesting recognition and bargaining. According to Morris, Petitte declined to do so, telling them to do what they had to do. Petitte's version is that he told them that he didn't have anything to say to them at that time; and requested that

they leave his office; and that the union representatives immediately told Petitte that he would hear from their attorneys.

Petitte then took the demand letter to David Frabutt, Employer's Controller, and it was decided that they should contact local corporate (but apparently non-labor) counsel which Petitte promptly did. According to Petitte he was told he didn't have to recognize the Union; that he should send the correspondence on and counsel would look into what was to be done; but that the firing of the men was definitely illegal; and they should be hired back to eliminate his exposure to reinstatement with backpay. Petitte asserts he went out to try to round up the men to bring them back to work.

c. *The evidenced circumstances of the recalls*

1. Trippitt's recall

It was Petitte's understanding three of the men did not have phones. He instructed Freeman to contact Trippitt (who did have a phone); and Petitte intended to contact Heller and Eddy but asserts that he could not locate them during the afternoon of April 19. On Thursday, April 19, Freeman contacted Trippitt. Trippitt testified that Freeman asked him if he was ready, or wanted to come back to work. Trippitt replied yes, but not until the beginning of the next week. Trippitt's version is that Freeman also said that he was talking about (with) a sufficient raise. Trippitt inquired what did Freeman call a sufficient raise, Freeman said $8 an hour. Trippitt asked if Freeman was going to call the rest of the men. Freeman said yes, as soon as he could contact them; and Freeman then asked if Trippitt could come down that evening and talk to him about it. Trippitt recalled that the Union was not mentioned in the phone conversation, but testified it was mentioned later that evening by Freeman.

Thus Trippitt testified that he subsequently met with Freeman about 10 p.m. at the scalehouse; and Freeman there told Trippitt that they would get the $8 an hour if they would forget about the Union and there wouldn't be no union there. Trippitt asked again if he was going to call back the other employees. Freeman (again) said yes, as soon as he could contact them. Although led, Trippitt testified that he also asked if they would get their backpay; and Freeman replied yes, next payday. Trippitt promptly pointed out that the next payday was the following day. Freeman then said okay, come in tomorrow and I'll have your money at noon. Trippitt returned at noon the following day, April 20 (Friday). Freeman gave Trippitt his money (in cash).[37] Significantly, Trippitt testified that Freeman at that time told Trippitt that there would be a meeting Monday on the hill.

Freeman confirmed that he called Trippitt and Bowman (though I find that Bowman was called later on Monday morning, April 23) after they were fired about coming back to work. At the time he and Roberson were trying to run the operation and Freeman relates that he wanted them back because they knew their jobs. However Freeman acknowledged that it was Petitte that had specifically asked him to call them and to get them to come back to work. Freeman confirms that he had called Trippitt and spoke to him at night (and Bowman during the day). He also confirms that he asked Trippitt (and Bowman) to come back to work and that he had also

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[37] Petitte (obviously upon report from Freeman) confirmed that Freeman contacted Trippitt, but that Trippitt couldn't come back to work on the following day, April 20 (Friday) because of a prior commitment, and also that he was needing some money. Freeman told Trippitt that Petitte was going to bring him back and give him backpay. Petitte relates that when Trippitt came by on Friday to pick up his (backpay) check, it wasn't ready; but that Freeman paid Trippitt out of Freeman's pocket; and then reported what he did to Petitte, who then had reimbursed Freeman.

told them they should forget the Union; that the Union was a mistake; that they should get back together and be like the family they were before. His version otherwise is that he said—I'll try to get us a raise, and that they'd get the wages stepped up, that he figured about $8. However, Freeman asserts that he had urged them to forget the Union and had mentioned future raises to them, on his own. Of course at this time not only was Freeman a supervisor as found, there would by this time be no question in the eyes of the employees that he was acting in that capacity for management. Moreover, his offered answers as to why he would at this time (even) think he could anticipate receiving still further raises after all employees had only recently received substantial wage increases, were if not discernibly and revealingly nonresponsive, they were certainly, and clearly not convincing. Far more plausible is Petitte as source, and his own expressed willingness to combat union interest amongst his employees with promise of still more substantial wage increases. Accordingly I conclude and find, that the Employer thereby has unlawfully promised employees increased hourly wages to dissuade employees from interest in the Union in violation of Section 8(a)(1) as alleged in the complaint.

In the early morning of April 20 (Friday), Harmon again came to Heller's house and told Heller that Forman Casino wanted to meet with Heller at 8 a.m. down in Maidsville, but across the road from the preparation plant on the hill, so no one could see them. Heller did as directed and Foreman Casino met him up on the hill. According to Heller's uncontested testimony, Casino on that occasion asked him what do you know about a union; and specifically asked Heller if he had signed a union authorization card. Heller told Casino that he didn't know what Casino was talking about. Casino then inquired why Heller was mad; and Heller replied that he was mad because he had been fired, and the way he

had been fired; stating that if he had done something wrong he could see it, but he didn't appreciate the way he was fired. In this conversation Heller also told Foreman Casino that he had contacted a couple of attorneys (though he hadn't as yet) and had spoken to a couple of government officials who were going to take care of the matter for him. With that said Heller left and went home. As Casino did not testify, the testimony of Heller stands uncontradicted. Accordingly, I conclude and find that Employer has thereby interrogated its employees as to whether they had signed a card, and otherwise as to their union activities, interests and sympathies, all in violation of Section 8(a)(1) as alleged in this complaint.

2. The Petitte and Heller-Eddy meeting of April 20; alleged threats, and promises of further wage increases and improved working conditions and benefits.

Between 10:30-11 a.m. that same morning, Amelio Petitte (another brother of the Petittes) came to Heller's house; and he informed Heller that Petitte wanted to see Heller down at the preparation plant at the scalehouse. Heller inquired how come; and Amelio Petitte replied that he didn't know why, but that Petitte had said he wanted to see Heller down there. Heller responded that he knew what it was about, that it was because of the Union. Amelio Petitte said he didn't know, and left.

It was not long thereafter that Eddy arrived at Heller's house. Heller was asking Eddy if he had found a job as Petitte pulled up in the driveway. Heller and Eddy went outside to meet Petitte. Petitte began by saying he didn't know what he was going to do with them.[38] Heller inquired what Petitte meant; and Petitte asked if they wanted their job back. Heller replied that we do

[38] The following is a composite of mutually consistent and credited testimony of Heller, Eddy and Petitte. Where substantial conflicting variances appear they are noted.

and we don't. Petitte asked what kind of an answer that was; and Heller responded we'll let you know in a couple of days. That was unacceptable to Petitte who told them if you want your job back, you report to work, and if you don't, that's it. Heller told Petitte he didn't, that he couldn't go back under the conditions that they worked under; and that he was mad over receiving a termination letter, rather than Petitte confronting him. Petitte said he had written the letter in haste; he knew it was wrong when he did it; that he was sorry for doing it; and he wanted them to come back to work. Heller asked was Petitte going to hire anyone back; and he said he was; and, upon inquiry, that he would pay them their backpay. Petitte asked what was so bad about the working conditions down there. Both employees told Petitte that they were tired of being harassed by Foreman Casino. Petitte described in greater detail (which I credit) that as he had started back to the truck Heller had said to him, wait just a minute, you know that there is more here than just a job; your problem is a lot more. You wouldn't have had any problems if it wouldn't have been for one boss down there; and you know damn well who I am talking about. Petitte replied he thought so. Heller said that Casino rode employees too hard, gave them too much hell; that he didn't think they had to work under those conditions; that it wasn't (just) their opinion; that 50-60 percent of the work force felt that way; and that Heller said if he got rid of Casino, that everything would probably get back to normal down there. Petitte said he could resolve that problem immediately (and he subsequently did so).[39] Heller said

[39] Petitte explained that Heller and Eddy didn't know it but that was the second or third time that (other) employees (including Freeman) had complained to him about Casino, and that Petitte had already made up his mind to put Casino in another position. The three new job applicants who were hired on April 18, but did not report for work until April 23-24 were put to work on a third shift, with Casino (as Petitte relates) assigned not as foreman, but as their leadman.

there were some other points and he mentioned wages and other subjects and Eddy mentioned retirement. Petitte had them wait a minute while he obtained paper and pencil from the truck so he could write the items down; and then they went into Heller's house.

There is conflict over what was said about wages. Heller's version is that he said he didn't think they were paid enough; and that it was Petitte who said he would pay them $8 an hour, if they came back to work. According to Petitte, Heller referring to their conversation earlier in February, stated he had circulated it, and he was looking for $8 an hour. Petitte replied, if that's what it is, that's what it is, I told you that I would take care of you when you come back to work. On rebuttal Heller denied that anything was said to him by Petitte about having earlier promised him a sizable increase; and Heller testified that they didn't discuss his personal rate at all at that time. (Eddy didn't remember that part of the conversation.)

All confirm that Eddy brought up retirement; and Petitte recalled specifically that Eddy said he was looking for some type of retirement, that he didn't want to end up 20 years down there with an empty bucket. Petitte said he knew that they (Eddy and Heller) had signed cards, told Eddy that he could oblige Eddy with a job in the deep mines, which Eddy promptly declined. Heller also suggested that the employees receive vacation pay, paid holidays and that overtime be made optional; and Petitte agreed immediately that overtime could be optional. (Heller testified that the employees theretofore had been receiving an overtime requirement at the last minute.)

Petitte relates that the men also requested that there be mutual respect between employees and bosses. Petitte said he didn't see where there is any problem to resolve there, that he didn't feel that he had ever had any prob-

lem with them. They replied that it wasn't Petitte; and that he knew who they were talking about. They told Petitte that he had just a few problems down there; and that they thought the union problem could be resolved if he was willing to meet their demands.

Petitte said he couldn't afford to have a union down there, that it would break him; that there was no threat intended, but if a union did come in down there, the work force would be cut back, and it would probably include both of them. Petitte said he would contact the insurance man and get a pension plan started right away; however with regard to the requested pay increase, vacation pay and paid holidays, he couldn't give that to them unless the Union was voted out; and as soon as it was, he would give all the employees $8 an hour, paid vacations and paid holidays.[40]

There is also some conflict as to who may have initially suggested that Heller act as spokesman for the employees. Heller testified that it was Petitte who suggested to Heller that since he was doing most of the talking why didn't Heller just be the spokesman for the employees. Heller said he would do so only if the employees could come directly to him with their grievances and if he thought the grievances were menial that they

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[40] Although Petitte has denied he actually told the men he would grant them what (benefits) he had on the paper, Petitte has acknowledged that he did tell them at that time that he didn't see any problems with their demands; that he didn't think they were outrageous, or unreasonable; that they would be taken under consideration and something could be worked out; testifying finally however, that though not recalling it, it was quite possible that he told them, the above benefits could not be given until the Union was voted out, because that was what was in his mind at that time, to get things back to normal without a union. Under these circumstances I credit Heller's further recollection as well (as being the more plausible) that Petitte said (essentially) that he would rather split the savings, from having no union, with the employees and pay them.

then wouldn't need any further discussion with the management or bosses. However, Petitte asserts that he didn't suggest that Heller act as spokesman, but that Heller, who was doing most of the talking, stated to him that he would act as spokesman. Eddy confirmed Heller that it was Petitte who asked Heller if he would be spokesman and Heller agreed. In context either version would appear plausible. The finding that I do make there is the uncontrovertible one, that at a time when Employer had received demand from the Union for bargaining as exclusive collective-bargaining representative, Employer recognized employee Heller as the employees' spokesman for discussions on improved wages, hours and working conditions. Petitte told Heller and Eddy to report for work on Monday, and they said they would.

On the basis of the above findings I readily conclude and find that Employer has threatened employees with a cutback in operations and layoff if they selected the Union as their collective-bargaining representative; and has promised employees increased hourly wages and improved working conditions and benefits in order to dissuade them from selecting the Union as their collective-bargaining representative and from engaging in activities on behalf of the Union in violation of Section 8(a)(1) of the Act, as alleged in the complaint.

3. Petitte's second visit to Heller's home

Heller relates that on the following Saturday morning, April 21, on returning from the store, he observed Petitte in his driveway talking to Mrs. Heller. As he approached, Petitte said he had talked to the insurance man about the retirement program; and that the way it would be set up was that if an employee worked for the Company for 30 years he could retire with $170,000 to be paid all at one time or so much a year or month. Petitte also informed Heller that there was to be a meeting at 3 p.m. on April 23 (Monday). Petitte also inquired of

Heller if he would like to have his job back in the scalehouse. According to Heller he replied yes and asked what the rate would be (because when fired as highlift operator he had been making $5.50 per hour) and Petitte said he would let Heller know on Monday and told him to report in on Monday.

Petitte confirmed that on Saturday, April 21 he had returned to Heller's home; and that Heller was not there when he arrived. Petitte spoke to Heller's wife. According to Petitte, Mrs. Heller said she would really like for Petitte to take Heller back. Petitte told Mrs. Heller that they had (already) decided that. Mrs. Heller then said that Heller would like to have his old job back in the scalehouse because it was private; that their home life had been disrupted by Casino chewing Heller out, harassing him, or expecting him to do more work. Petitte did not recall Heller being there, but adds he may have. However, Petitte acknowledged that in either that conversation (with Heller present) or in the conversation with Heller the day before, he told Heller that there had been a meeting arranged for insurance purposes at the office; and that he told Heller what Hawkins was trying to provide for him, and some men at the mine, explaining a sum would be taken out of pay, and that after 30 years it would amount to $175,000, and be available in lump sum or installments; and that they could talk to Hawkins about it. According to Petitte he told Heller how it worked, but that it would be up to him if he wanted to inquire (further)about it. Petitte denies that he said who was going to pay for it; or that Employer intended to set up the plan, or pay contributions to it. If not to report on the plan and a meeting Monday on it, it is hard to discern from this record what was the purpose of Petitte's additional visit. Additionally I would find it also hard to believe that there would have been discussion with Heller on Friday about Heller's return to his former job as weighmaster and his wife not be aware of that arrangement as indicated by Petitte's rec-

ollection of her request made of him on that subject that day. I find Heller's version is more consistent with Petitte's admission of Mrs. Heller having made such inquiry, is more plausible, and I credit it. I thus find that Petitte's visit that day to Heller's home was to report to spokesman Heller on what he had additionally found out about the retirement plan and to advise Heller that there would be a meeting on it on Monday. I further find that after discussions with Heller's wife, Petitte offered Heller his former job back as weighmaster. The record has persuasive support for Heller's return as weighmaster at this time, *viz.*, business had been both backed up, and picked up; employees began working more hours; a third shift was added, and kept on; and there is essential admission by Petitte otherwise of clear improvements independently warranting such at the time. However, it should be observed that Petitte's willingness thereon came with Heller's indication to Petitte of equal willingness on his part to speak on behalf of the employees without the Union. These circumstances were to appear to change.

4. Petitte seeks additional advice

Charles T. Lazzell has been a neighbor and friend of one of the Petittes for some 25 years. Prior to March 1979 he had been employed at a state university (1966-67), and became President and Business Manager of a Laborer's Local Union, for years representing (1000-1500) state employees. However, in March, 1979, Lazzell had resigned to go into business for himself as a building contractor. Petitte relates that his sister knew Lazzell and had suggested that Petitte go talk to Lazzell. On Sunday, April 22 Petitte and another person drove over to Lazzell's home and spoke to him. They told Lazzell what took place.[41] Petitte told Lazzell of the dis-

[41] However Petitte's recollections as to what he told Lazzell about his earlier contact with (corporate) counsel was inconsistent if

charges, and rehiring, and of the demands made upon him by Heller and Eddy. Petitte also told Lazzell that he had fired the four men because of the union organizational campaign; but that he fired Eddy also because Eddy had caused him a lot of problems with drinking and coming on the property. According to Petitte, Lazzell suggested that he contact present counsel of record, which Petitte did later that evening. Lazzell also went over some things Petitte should not do; *viz.*, that he should not fire anybody; that he should not get involved in any negotiation (with the men); that he should thereafter put everything in writing. Lazzell also expressed a willingness to come down to Petitte's office and do what he could to help make sure that Petitte's conduct was (thereafter) orderly and that he not do the kinds of things on which charges would be brought.

5. The events on Monday, April 23

a. *Heller's limited return, Eddy's return delayed.*

On Monday morning, Heller went to the scalehouse where he had worked before and where Roggish had been working as the weighmaster in the interim. Petitte arrived and told Heller that he was to work along with Roggish for awhile to observe the bookkeeping (and/or filing) system that Roggish had in the interim set up, as he wanted it done that way. Petitte also told Heller that he was to tell Eddy when he came in to go on back home until 10 a.m. Heller inquired why; and Petitte replied that he was thinking about not hiring Eddy back, because Eddy had a drinking problem. Heller told Petitte that he didn't think that Eddy drank anymore than the rest of

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not in direct conflict. Thus on direct Petitte relates he told Lazzell that he was not satisfied with his attorney and was looking for help. On cross-examination he related he didn't tell Lazzell of contacting the attorneys, or advice received, though acknowledging he was kind of vague on this subject.

them; and that it is not right if Petitte was going to have Heller back, not to hire everybody else back. However, Petitte did not change the instruction; and when Eddy arrived, Heller told Eddy what Petitte had said. Eddy then left to return at 10 a.m.

After Petitte had spoken to Heller he proceeded on through the yard and then went up to the office where he met with Lazzell; and Lazzell again went over with Petitte some of the things Petitte could not do. *Inter alia*, Lazzell told Petitte that he should not talk about wages, or anything beneficial to the men, or anything harmful to the Union (with examples); but that he should run the business the way he had in the past like the Union never happened. As noted in the first discussion of the terminations Sunday, Lazzell related that he had told Petitte that he should hire everyone back and pay them their back wages. However in that regard Lazzell has also testified that they had talked mainly about Eddy's drinking. Lazzell also testified that he had told Petitte that the matter of Eddy's drinking had not been documented enough to support Eddy's discharge, itself suggestive that there was a review of record. (Any such review would be more likely to have taken place that Monday morning and may well be the account for the delay until 10 a.m. in the decision of eventual reemployof Eddy.)[42] Eddy returned at 10 a.m. At that time

[42] Lazzell had variously testified that the purposes for his appearance at Employer's plant on Monday (and presence off and on, but for substantial periods in the next 2 weeks) was to keep Petitte from engaging in conduct that would be construed unlawful activity; that a priority of his on Monday was to similarly instruct the formen; and to be available to explain to employees that Petitte could not discuss with them at that time any improvements in their wages, hours and working conditions, as they were expecting. Lazzell has denied that he participated in antiunion strategem, testifying he had been a long time business agent, who was proemployee, not promanagement; and he had provided this assistance of explaining the rules to Petitte as a friend of the family, for which time and effort he was not paid, though he has acknowl-

Heller called Petitte and notified him that Eddy was back. Petitte came down with Lazzell, whom he introduced as his advisor. Petitte inquired of Eddy whether he wanted to work the afternoon shift (*that* day) and Eddy replied yes. Petitte then said okay. Heller asked Petitte if he had contacted employee Earl Bowman about the 3 p.m. meeting. Petitte replied that he couldn't and didn't know how to get ahold of him. With that Heller inquired if Petitte minded if he and Eddy tried to find Bowman and let him know because this was an important meeting. Petitte then told Heller that he couldn't go over the proposals, that he couldn't make any promises to the employees, that he couldn't offer them anything because it would be illegal. He also stated that he could not bargain with them because it would be illegal. Petitte testified credibly that Heller became extremely upset about their not talking about the demands. Heller asked if he could talk about it with the men, as the men were going to be upset. According to Petitte, Lazzell said that is up to you, that the men are allowed to talk about what they want to. Heller then inquired how it would be if at the meeting he brought up the proposals and Petitte could either agree or not, that would get him off the hook. According to Heller, whom I credit Petitte did not answer; and Lazzell said if you bring it up at the meeting we'll give you your answer then.[43]

Heller also appears to relate that Petitte in this same conversation (in Lazzell's presence) inquired of them whether you guys really want the Union in; and that

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edged at the time having some present and potential business interests (in coal property lease) with the Petittes. Be that as it may, the record is clear that he did give recommendation on Eddy's return, whether on review of just discharge letter on Sunday, or after a further review of Employer's records on Monday morning.

[43] Lazzell's explanation for same was that he didn't know the answer to the question if the employee themselves approached the Employer; and they had to consult counsel. When they did they found out they could not do that either.

Heller responded that if the employees had been taken better care of in the past no one would have to worry about a union coming in now, but it looked like it was kind of too late for that. Heller's testimony indicates that Petitte stated on this same occasion that he was thinking about not hiring Bowman back either, because Bowman came from a union family, and Petitte was afraid his family might influence Bowman's decision about the Union; and he said he knew Heller and Eddy had signed cards, and said that he couldn't afford to have a union in there, and that if one did come in a lot of people would lose their jobs. Although Heller (and Eddy) have placed these statements in the 10 a.m. conversation with Lazzell present, Petitte has denied making such statements at that time; and Lazzell has also denied hearing them ever said by Petitte in his presence. Lazzell does relate that Petitte in telling the employees he could not discuss the wages and benefits with the employees, had told them that—I can't talk to you about that now, but if you would have come to me before, we could have talked about it.[44]

Petitte *has* testified otherwise, that he thought he did tell Heller he was thinking about not bringing Bowman back because he was from a union family, but was unsure when he did so, though he was sure it wasn't after Lazzell had just instructed him as to what he could not do, and further believed it would have been before April 22 (Sunday). Lazzell has testified that one of the purposes he was present was to keep Petitte from engaging in such unlawful conversations with employees; and that

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[44] I further credit Lazzell (and Petitte) that in Lazzell's additional discussions with employees in the yard that morning informing them that Petitte was unable to discuss wages and benefits with the employees, they followed a restrictive format. I thus further credit Lazzell that when one (or more) employee(s) then inquired about employees getting the union cards back, the employee(s) were told that was a matter between them and their union.

Petitte did not threaten employees (in his presence). I am persuaded from Heller's testimony and Petitte's essential affirmance, that these remarks were earlier made; and from Eddy's recollection of being also present, thus probably made in their earlier conversation held on Friday, April 20. In that connection I observe that a call to Bowman was not made by Freeman until Monday morning.[45] I thus credit Petitte and Lazzell that such remarks were not made in the 10 a.m. conversation with Heller and Eddy as they have recalled. However I do find that the remarks as made earlier in the April 20 conversation were additionally violative of Section 8(a)(1) as a further coercive threat of nonrecall for union interest, and threats of job loss if employees selected the Union; and I find that they were likely made during the discussion and prior to the amicable understanding in regard to the future wage increase and benefits consideration by the Employer without the Union, as shown above eventually reached that day.

b. *The meeting at Eddy's house.*

Eddy and Heller then left and contacted employees Earl Bowman and Chuck Trippitt and arranged a meeting at Eddy's home to go over the proposals.[46] The four employees met and went over what they thought could improve the working conditions and the morale of everyone. The proposals discussed included employees receiving $8 an hour with overtime, paid vacation and holidays, suggestion box, optional overtime, and no harassment from the bosses to employees, or vice versa. Also the four

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[45] Bowman has thus testified that he next heard from Freeman at 9 a.m. on April 23. Freeman called Bowman and told him that if he was to forget about the Union, we could all come back to work, and be one happy family.

[46] Bowman confirmed that he received a call from Heller at about noon. Heller told him that there was going to be a meeting at 3 p.m. at the office, but that before going there, Bowman should meet at Eddy's house

who were fired would be paid backpay. The aforesaid employees then left Eddy's trailer and returned to Employer's office to attend the meeting scheduled for 3 p.m.

c. *The office meeting.*

Heller relates that before he got in the door Petitte took Heller aside and informed Heller that he could not even bring up the proposals because Petitte had received a letter from the NLRB, prohibiting him from bargaining with them in any way; and that he definitely couldn't grant any proposal that might come from employees. Heller responded that this (development) isn't going to go over very good with everyone else. Petitte responded his hands were tied and there was nothing he could do, that it would be illegal if he did it because of the NLRB letter. Petitte confirms approaching Heller in the hall before the meeting that afternoon; and that he told Heller that they had received a letter from the NLRB, that his hands were tied; and that he could not talk about anything to anybody if he wanted to; that management couldn't discuss terms of demands, or negotiate, that it was too late for that now; that he was not allowed to discuss any of the things that they had talked about at Heller's home. He also testified that Heller said that the guys were going to be upset; and that he would bring it up. Petitte handed the NLRB papers to Lazzell in the hallway. They went into the meeting.

In attendance at the meeting held in the Employer's conference room were Petitte, Guseman, Lazzell, and all the employees including Fain, but excluding employee William Elliott who was absent that day.[47]

Petitte started the meeting by telling the employees that he couldn't talk to the employees because he had re-

[47] **The following is a composite of mutually consistent and credited testimony of Heller, Trippitt, Eddy, Petitte, Lazzell and Freeman.**

ceived a letter[48] from the NLRB; and introduced Lazzell to them as a man knowledgeable in such matters. With the papers in his hand, Lazzell then told the men that Employer had been served by the NLRB; and that they could not get involved with them in a conversation (about benefits). Heller said he would like to have a meeting with the Company; and he asked that they discuss the money and benefits. Lazzell replied that was impossible, that it was illegal for them to discuss wages, hours or working conditions; that they couldn't negotiate, or promise them anything, that it be like bribery. Lazzell introduced Hawkins saying Hawkins was going to go over the (existing) insurance plan changes (dental plan).[49] An employee (probably Eddy) sought to raise an inquiry about the retirement plan and Lazzell told the employees that Hawkins could not talk to them about a (new) retirement program, explaining that that would also be considered bargaining, or bribery, but that Hawkins would be going over the existing benefits; and he would answer all their questions (in regard to claims and new dental coverage).

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[48] The referenced letter was apparently a letter of the Board's Regional Director dated April 20 which had accompanied copy of charge filed on April 20 by the Union, charging the Employer with commission of unfair labor practices in the discriminatory discharge of employees Bowman, Eddy, Heller and Trippitt on April 13. I do note the petition was filed on April 20 as well.

[49] There is much evidence presented by the parties on the origin of this meeting, with Employer urging that the meeting was one which had been set up previously with the insurance agent, for the sole purpose of responding to prior questions posed by employees as to their insurance claims service and prior changes made in the existing benefits. However, I find that this meeting has been set up at this time for other purposes as well, including *inter alia*, for a discussion of the (proposed) new retirement insurance plan, which discussion was at the last moment cancelled under the circumstances described above.

Heller then asked if the employees could have a meeting. Lazzell told them they could but that management would have to leave. Heller asked that management leave; and they did, except for Freeman.[50]

Heller had a paper and told the employees this was what they were supposed to get if they didn't join the Union. Heller then read off the proposals that the employees should put to the Company for improved benefits and working conditions. Freeman said that it sounded good; and Freeman then suggested that they have a vote to see who was for them or against them by raising hands. All did and it was unanimous. Freeman then went outside and brought in Employer's secretary Janice Cyzick (also a notary public) who typed as directed a memorialization that a vote was held on the employees' specific proposals and that it was unanimous.

Freeman then stated that they would have a vote on the Union and if the Union was voted they would get all these proposals effective that day. However, Heller responded that he was not going to vote on the Union; that if there was an election held they would vote on the Union at that election. Freeman, however, pressed that they were going to vote on the Union and requested all that were against the Union to raise their hands. Five people raised their hands (including Fain). He then asked for all who were for the Union to raise their hand, and no one raised their hand. Freeman then said that if it took all day long they were going to have a vote; that they were going to vote the Union out. Heller replied, you're not going to make us vote; there will be a time and

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[50] In that regard Employer would have it noted that Freeman remained, without question raised by Heller. It might just as well be observed that Heller, urged by Employer to be a supervisor, had also remained without a question raised by Employer. Of course, the explanation for this arrangement being satisfactory is readily apparent. Employer knew what was to be discussed, likely outcome, and approved and supported it.

place; and Heller said even if they did vote it wouldn't be fair anyway because it wouldn't even be a secret ballot. Freeman then suggested they could write down on a piece of paper either yes or no. However Heller rejected that also, saying that he was not going to vote. The other three (discriminatees) agreed with Heller. Heller then stated that was the end of their meeting. However, the vote on the Union that transpired was first also memorialized, at Freeman's urging. Heller then told the secretary to mark on the paper that four had abstained. The four who abstained were the named 8(a)(3) discriminatees (Bowman, Eddy, Trippitt and Heller). All present signed this memorialization as well.

I find that by the acts and conduct of Supervisor Freeman, and of Petitte, with his awareness, and the support and assistance provided employees in such, Employer has effectively interrogated and polled employees as to their union sympathies and desires; and has unlawfully in effect promised employees increased hourly wages and other benefits, in order to dissuade the employees from selecting the Union as their collective-bargaining representative; and that it has thereby unlawfully interfered with, restrained and coerced its employees in regard to their Section 7 rights in violation of Section 8(a)(1) essentially as alleged in the complaint, and/or as fully litigated herein.

The insurance meeting with Hawkins followed. After that meeting was over Heller met Petitte in the hallway. Heller brought up the subject of the employees' backpay. It was Heller's understanding, that Petitte's promise on the earlier Friday was to give the employees their backpay if the Union was voted out. In any event, Heller brought up to Petitte that Petitte had said that he would give them their backpay. Petitte acknowledged that he had done so. Heller then suggested that if he (Petitte) wanted to win the employees over to the Company's side, it would probably help to give them backpay since they

could not get the proposals. Petitte said okay and asked him to wait a minute while he got Lazzell. Lazzell then said if Petitte had promised it he could give it. Petitte agreed to do so. Petitte then left, obtained checks for the employees and handed them out. Petitte's version is that after the latter insurance meeting Heller asked him in the hallway if the (four) employees could get their backpay. Petitte had told the men individually and by others that he would reinstate them with backpay. When asked, Petitte said he didn't see any reason he couldn't do so; and he inquired of Lazzell, who agreed. Petitte then instructed the secretary to make the checks up, but he didn't know how they were computed. He confirms that Trippitt, who had already been paid, endorsed his check back over to Petitte. The employees went to work that afternoon, excepting Heller who returned to work the following morning. The recorded and signed memorializations of wage and benefit requests, and vote on the Union were turned into Petitte and Lazzell and after review, forwarded to Employer's attorney. Given the prior discriminatory discharges, I do not find any additional violation of the Act in the award of a sum of money to employees as backpay in the above circumstances.

d. *The subsequent treatment of Heller; and related issues bearing on allegation of constructive discharge.*

On April 24 (Tuesday) Petitte came by the scalehouse in the morning and asked Heller how the men felt about the Union now, especially since he couldn't give them the proposals. Heller responded that he couldn't be sure, that he felt that they were upset because they had been looking forward to these new benefits. Heller's testimony at hearing that it was his best recollection that it was either in this conversation or a later conversation that day, that he had asked Petitte what his rate of pay would be since he had received his weighmaster's job back. According to Heller, Petitte replied it would be $8 an hour, $320 a

week or $1280 a month and effective April 23. There is no question that Heller received such rate of pay as of April 23. There is dispute as to when the arrangement on it was made between Heller and Petitte, discussed, *infra.*

On the same day, April 24 (I find) Guseman told Heller that Petitte had instructed Guseman to tell Heller that Heller was not to go outside and help around the yard, that he was to stay in the scalehouse and just weigh the trucks, though Roggish had remained there also on weighmaster duties, including handling all the paper work.

On April 25 (Wednesday) Petitte again came by the scalehouse and asked Heller how he was doing. On this occasion, Heller replied, not very good and Petitte asked what was the matter. Heller replied, the thing about the Union had gotten him pretty nervous and he just didn't feel good. Petitte asked how the employees felt and Heller responded he didn't know, he wasn't sure. Petitte continued, do you think they'll vote it in or out. Heller again responded he didn't know, he wasn't sure. Heller then said he was sick; and he asked to go home. Petitte told Heller to wait a moment. Petitte went to speak to Lazzell who was nearby, but not in the conversation. They returned to Heller, and Lazzell told Heller, you can go ahead and go home if you feel that bad. Heller said he would contact them by Friday to let them know how he felt. Though somewhat unclear in the record, either Petitte, or Lazzell then said, you're not going to quit are you; and Heller replied no, he was not going to quit.

The record herein has been left somewhat choppy (by both parties) as to the days that Heller subsequently worked. It is thus on the basis of records, such as were made available, and inherent plausibilities of the credible evidence of record that I have made the following findings. Petitte sent a letter to Heller dated April 27 which recorded that a grant of time off was made because of

Heller being physically ill; and after reciting that Heller was to have contacted Petitte by phone, but had not done so as of 9:30 a.m. Friday, April 27, it went on to provide as follows:

> Per our conversation Friday morning, April 20, 1979, you requested your previous duties and responsibilities as weighmaster, timekeeper and assistant supervisor of coal movement. At this time I would like to confirm your reinstatement and salary as $1280 per month which annualizes at $15,360. In regard to salary, per our conversation, your new salary became effective Monday, April 23, 1979, and your supervisory responsibilities will commence on Monday, April 30, 1979. We are holding your job open presently. Please call me not later than 3 p.m. Monday, April 30, 1979, regarding to your return to work. (underscoring supplied.)

It will be observed, however, that I have found earlier, on the weight of credible evidence, that the subject of Heller's return to the weighmaster job was actually broached by Heller's wife (as reported by Petitte), and then raised by Petitte and agreed to by Heller and Petitte on April 21, Saturday. Heller also testified, I find credibly that nothing had been said concerning any supervisory duties at all, before certain discussion he had later with Petitte about the content of the letter in that respect. Not only does the letter reflect a self-serving nature, I observe in passing that it reveals on its face an *in futuro* commencement of the asserted "supervisory responsibilities" on Monday, April 30. In that connection Heller testified credibly that he did not go back to work that Friday, April 27, nor on Monday, April 30. However, it is clear that Heller contacted Petitte on that Friday afternoon. Heller recalled it as a phone call while Petitte indicated there was a visit. Thus, Petitte acknowledged that there was an occasion when Heller came to the office and reported he had been terribly upset and gone to the

doctor; that the doctor told Heller that his nerves and job were getting to him; and the doctor had told Heller to take 2 weeks off. That Heller did contact Petitte in that manner on the afternoon of Friday, April 27, is additionally supported by the circumstance that Petitte sent Heller a second letter that day, also dated April 27 which then provided:

> Since you have requested 2 weeks off due to irregular health problems, there is no reason why the two weeks of absence without pay cannot be granted. However, we expect you to report to work at 7:00 A.M., Monday, May 14, 1979.
>
> In regard to your illness, Janice Cyzick, Secretary, will answer any questions you might have about sickness and accident benefits.[51]

I am thus persuaded, and I find that Heller probably visited with Petitte on the afternoon of April 27 (Friday), some time after consultation with a doctor, who had suggested he take 2 weeks off; and that it was later, in the next week, and probably early that week, Heller had called Petitte and told him that he was feeling better and would be coming back to work (early). I further note in the latter connection, that Heller's recollection that there was also a discussion with Petitte in regard to the reference to "supervisory responsibilities," a matter appearing in the first April 27 letter, and that Petitte had told Heller, when Heller questioned him on it, that Heller had the *same* duties that he had before, is then also wholly compatible with Heller's prior receipt of the letter, whereas a conversation thereon on April 27 would have been less plausible.

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[51] The new procedure of putting such arrangements made with employees in writing was one initially urged upon Petitte by Lazzell.

Heller has testified that he returned to work on May 1 or 2, and I find more probably on May 2, Wednesday.[52] Petitte told Heller that he had a problem with one of the employees; that Freeman and Guseman had told Petitte that Eddy wasn't doing his job on day shift, he wasn't shoveling the tailpieces down on the river. Petitte then told Heller that he could not go to Eddy and reprimand or holler, that Eddy would just get mad at Petitte and probably try to go ahead and vote the Union in. Petitte told Heller that he wanted Heller to tell Eddy that he was going to have to do his job better or else Petitte was going to have to let him go. Heller agreed to do so. Heller recalls it as being the following day that he told Eddy what Petitte had told him to tell Eddy, that he was to shovel tailpieces like everybody else on the afternoon and midnight shift, otherwise he would lose his job. Heller testified that Eddy became upset, Eddy contending that others were also involved; and asserting that it wasn't right that he should be getting all the blame. (Heller of course, would have had no opportunity for observance of Eddy's performance on that job, nor that of others on it.)

Heller also testified that later that same morning (May 2) Petitte came by and said that he was mad at them. Heller inquired why. Petitte said that every time he had talked to them about the Union or anything like that, it seemed like outsiders would find out about it; and he got into deeper and deeper trouble. Petitte told Heller that every time he would ask them if they were talking to

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[52] This would have constituted about a 1-week absence, and is essentially compatible with the testimony of Lazzell who, during the 2-week period commencing April 23, was there off and on, but for substantial periods; and who has testified that Heller was not there much in that period. In that connection however, I presently observe, that Lazzell's recollections tend to substantiate Heller, in that Lazzell recalled it as the late afternoon of April 23, or the next morning, that there were discussions with Petitte over what Heller wanted to come back as weighmaster; and that he told Petitte to put it in writing.

anybody other than him about it, they would give no comment; and he told Heller that he figured all his talk about trying to make working conditions (better) was just going to waste, because they were running to somebody at night telling that what Petitte was telling the employees.

Heller has also testified generally that on almost every day he worked, Petitte had continued to ask him what the men thought about the Union; and if they were going to vote it in, or vote it out; and that Petitte would also repeatedly tell Heller that he couldn't afford to have the Union; and that a lot of them would lose their jobs. Heller has testified that Petitte's continuing questioning of him about the Union made Heller nervous; and that when he had told that to Petitte, Petitte had replied it (the Union) was upsetting him too.

On the morning of May 3, Heller became actually sick to his stomach to the point he had to leave the scalehouse and go to the restroom. On his return to the scalehouse Heller informed Roggish that he was sick; and requested her to notify Petitte that he would contact Petitte later.[53] On the same day Heller called Petitte about noon. Heller told Petitte that he wanted to quit. Petitte told Heller that he didn't want Heller to quit; and Petitte asked Heller to come out to the office. Heller agreed to do so that afternoon.

Heller came out to Petitte's office on May 3 at 2 p.m. Heller told Petitte that the biggest thing (upsetting him) was being questioned about the Union all the time while

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[53] In evidence is the following note dated 5/3/79, addressed to Roggish:

Nikki
Tell Johnny that I came out to work this morning but that I got sick again. I'll be in touch with him. I guess I came back to work to (sic) soon.

Thanks
Rich.

working. He also complained that he was supposed to have his job back in the scalehouse but that Roggish was still there. Heller told Petitte that Petitte had told him as soon as he got back that he would take Roggish out and put her back in the office; that Petitte had said he had wanted Heller to assume all of the duties and responsibilities of the weighmaster job, but Heller couldn't do so with Roggish still in there. Heller also pointed out what Guseman had said Petitte had earlier said about Heller staying in the scalehouse. Heller said it would be better if Roggish went back to the office. Petitte agreed to bring Roggish back in the office, and did so the next day. Heller returned to work the next day, May 4, Friday, as sole weighmaster (though only for a time). I note Petitte confirms Heller's return May 4.

Aso noted Heller actually had come back as weighmaster earlier on April 23 with salary of $1280 ($640 biweekly) computed at $8 an hour on basis of 8-hours a day for 20-days per month (though $590 is shown on payroll record as to be effective April 18) and Petitte's letter reflects effective date being April 23. Heller asserts the agreement on his individual pay rate for the weighmaster job was reached after he had returned to the job, on either April 23 or 24, though his prior statements thereon have not always been consistent therewith. Thus respondent has established that Heller in prior affidavit (given on August 7) related the conversation with Petitte in which Petitte told him he would earn $320 per week or $8 an hour with the same duties as before had occurred on April 20, the prior Friday. (The statement insofar as in regard to discussion of job, but not rate, would clearly correspond to Petitte's letter of April 27.) Though acknowledging he had so stated it in that affidavit, Heller's testimony at hearing was nonetheless that it was not the 20th; but later, and that he was almost sure it was the 24th. Additionally, in prior affidavit dated May 8 (closer to the event), Heller had there recorded that Petitte had

raised his salary to $1280 per month on April 23. What is clear from the above is that there had been agreement of wage increase(s) for Heller reached by Petitte at least before Petitte's first April 27 letter issued. Respondent has introduced additional evidence in the form of a statement of Heller dated later, on May 3, that would have the arrangement made thereon even before the advent of the Union.

Before the consideration of this evidence, I would note that Heller has admitted that prior to his layoff, in February, he had asked Petitte for a raise; and Petitte has related that at time of layoff he had promised Heller a raise when he returned. However Heller categorically has denied that it was agreed at the time that his pay would be raised to the specific amount of $1280 per month on return to weighmaster job. Respondent has introduced a handwritten statement dated May 3, addressed to Petitte and signed by Heller, which on its face recites the contrary. It provides:

> To John Petitte Jr.,
>
> This letter is to inform you that I will be satisfied with my old job back as scaleman at the salary of $1280.00 per month that we agreed on prior to my layoff in February 1979, at which time when I was laid off the agreement between us was that when production picked up I would be hired back as scaleman at an increase of salary which we had discussed several months ago, when I had asked you for a raise but could not get because production was down.
>
> The intent of this letter is to let you know that I accept my old job back at the increase in salary.
>
> Sincerely,
>
> Richard G. Heller

Heller's explanation is that in their conversation on May 3, Petitte had said that he was worried about the pay increase that he had given Heller; that he might get in trouble over it. Heller otherwise acknowledged that he wanted the money; and that when Petitte asked him if he would write a letter in his own words stating that he had agreed to the raise in February, Heller agreed to do so at that time even though they had not in fact agreed to it in February.

Petitte's version is that on that day Petitte had called Heller at home and told Heller that he needed a letter from Heller confirming that Heller was accepting the weighmaster job offered. Petitte acknowledged that this was a new procedure which had never been done before; and that it was done pursuant to Lazzell's suggested procedure that everything should be put in writing. Petitte's explanation for doing so at this time was because Heller had informed him that he was coming back and Petitte wanted confirmation of it. With regard to the rate of pay, Petitte explains that when he and Heller had discussed the rate, since Petitte had earlier told Heller that he would compensate Heller for the time off, Petitte didn't see that there was any problem in paying Heller that figure; and he asserts he did not discuss it on April 23 or 24, but acknowledges telling Heller later that he needed written verification. Petitte relates (with corroboration by Cyzick) that the statement was Heller's voluntary statement thereon, orally acknowledged before Cyzick as being such by Heller at the time. Finally, according to Petitte, the fact of the matter was that Heller was interested in job and the money; and Heller wanted it confirmed as much as Petitte did. I have no doubt on this record that the latter was the case.

It is Heller's testimony that he returned to work on May 4 (Friday); but that in the next week beginning on May 7, that Petitte was back to telling him that he couldn't afford to have the Union come in; that he was

not kidding; that he was not threatening, but that Heller had to understand he could not afford to have a union come in; and that—if it does, you're probably going to lose your jobs. According to Heller, Petitte spoke to him that way just about every day that week; and it upset him. (Heller acknowledged that Petitte on one such occasion, on May 10 (Thursday), told Heller that he should not be so upset; and that he should not let the Union campaign get to him.) According to Heller, during the week of May 14, Petitte continued to talk to him each day, wanting to know if the men had changed their minds about the Union, and how they were going to vote.[54] Heller testified that he became nervous every time he saw Petitte coming.

The alleged threat to Heller of physical harm or reprisal.

Heller relates that on either May 17 or 18, and I find Thursday May 17, that Heller was in the scalehouse with

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[54] The Respondent also established that in a prior statement of July 26 that Heller had stated that he had talked to Petitte on May 16 and not returned until May 17, a Thursday. However, any suggestion thereby that Heller had not worked in the interim since May 3 is clearly to be rejected. Respondent's witness Roggish's recollection was that it was 3 weeks to a month before she was called back out of the office to work as the weighmaster. Respondent also has (selectively) itself introduced certain records (reports) which establish that Heller had worked specifically on May 8 (Tuesday), 11 (Friday), 16 and 17 (Wednesday and Thursday). In regard to the latter documentation I would note in passing that such reports reflect that Heller not only signed them, as he usually did, Heller also signed his name and showed his hours worked under the caption of "Superintendents and Bosses exposure time," along with Guseman. However, the earliest such record produced was that of May 8; and thus no such documentary evidence was offered by Respondent to establish that such reports were filled out by Heller in that fashion prior to May 3. It is well founded in the law that when weak evidence is offered where strong evidence is available, an inference is warranted that the strong evidence is not offered because it is not supportive of the holder's position. I conclude and find such is the case here.

another individual from Black Rock Test lab taking coal samples. At the time he observed that Petitte was out on the scales talking to a couple of other individuals. Heller describes the following incident then occurred.[55] Heller testified that one of the men whom he had seen conversing with Petitte came into the scalehouse. The man then locked the door behind him. Heller describes the man as being 6-foot tall, 250 pounds, with great big arms and neck. The man walked up to Heller and pointed his finger in Heller's face saying—"What's this I hear about a labor problem down here?" Heller backed into the corner and replied he didn't know what he was talking about. The man continued to keep shaking his finger in Heller's face saying—"I'm going to tell you something, I don't want to hear no more about a labor problem down here. The Petittes don't want a union down here, so I better not hear no more about it." He then pointed to the other Black Rock individual and told him that it went for him too. Heller identified the individual as being from another company and not involved. At that point there was a knocking on the door; and after Petitte was let in, Petitte inquired what was the matter, telling Heller he looked like he had seen a ghost. Heller told Petitte that he didn't appreciate what Petitte had just had the man do to him. Petitte then apologized in front of everyone and said that he was just kidding. Heller responded that it (the apology and explanation of it being a joke) didn't help his nerves; and that he thought the guy was going to put him through the wall. Petitte said that he was just razzing Heller a little bit, joking with him and didn't mean it seriously. Heller said he still didn't appreciate it. Petitte again told Heller not to let it get to him; but

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[55] Heller's affirmance that Petitte had subsequently told Heller not to let the pressure get to him, I find also occurred on May 17, after the above incident herein described. Apparently Heller had not worked May 14 and 15 of that week, although I note Employer has *not* established such documentarily, but through concession of Heller which I have found not always supported by the record.

Heller replied he couldn't go by what Petitte was telling him. On this matter I fully credit Heller.

Petitte essentially confirms the incident, would explain it as just a joke on Heller who was then regarded as part of the operation. However Petitte acknowledged the man was opening up the Jasper mine and compatibly described him as: "This guy's a big burly looking guy, pretty rugged looking." I would only additionally note that Roggish recalled that it was on a Friday (after her 3-4 weeks in the office) that Heller was absent and she was directed to return to the scalehouse; and continued to work there thereafter by Petitte's direction. Given the latter and the absence of any record (daily report) produced for Heller as to May 18 (Friday) I find that Heller was absent that Friday. Heller would return for work one last day, Monday 21.

On May 21 (Monday) Heller went back to work. That morning he observed that the creek by the scalehouse began running black. That meant to Heller that the ponds were overflowing. It was Heller's responsibility to have it immediately taken care of. Heller promptly told Superintendent Guseman the creek was running black and (pursuant to his own instruction from Petitte) that Guseman had better get somebody up there to take care of it. Guseman replied that he would take care of it. Heller waited an appropriate time but Guseman did nothing about it. When Guseman continued to do nothing about it Heller again told Guseman that he had better go up there, or get somebody to go up there and take care of it; that if Petitte came to work and saw it, Heller was going to catch hell. Guseman again replied he would take care of it. Heller acknowledged that a few minutes later Guseman did so. However Heller has testified that in the interim he became nervous, began shaking and got sick again. Heller decided that he was going to quit. Heller went up to Guseman and told him that he was going to quit, that he could not take it anymore; and he told Guse-

man to tell Petitte not to bother sending Harmon or anybody else to his house; that he didn't want to see anybody, he quit. I credit Heller.

Nonetheless, shortly after that, Heller relates that Harmon again (after message left at home) spoke to him and his wife, telling them that Petitte wanted to know why Heller had quit. Heller replied that he had just had it, there was too much pressure on him, he couldn't take it anymore. Heller's wife told Harmon that Petitte was picking on him all the time and that it wasn't right. Heller then said to Harmon, "Tell Petitte that it's just too much pressure, I can't take it anymore." Heller also told Harmon that when he quit earlier he had told Guseman not to send anybody because he didn't want to talk to anyone. Heller asked why Petitte kept sending Harmon up there. Harmon repied it was because Petitte knew they were friends and that he (Harmon) could probably talk to Heller later. Heller testified that Harmon on this occasion didn't say that Petitte has asked him to come back; only to find out what was wrong.

Analysis, conclusions and findings

Petitte essentially does not deny the various questioning of Heller as to the union activities and sympathies of employees. Thus Petitte has admitted that after Heller returned to work as weighmaster, he spoke to Heller on several occasions about the Union, asking Heller if he heard any of the men talking about the Union; and probing him as to such matters as whether he felt that the Union had a foothold; whether the men would be for or against them; and whether the Employer would get favorable reaction or not. While not recalling them individually, Petitte does not deny having conversations (pre-May 3) with Heller in which he stated that the Company couldn't afford the Union; or what might happen in regard to jobs if the Union got in, e.g. that Heller would probably lose his job. I credit Heller in all the

above respects. Essentially Employer's defense is that when Heller returned as weighmaster, Petitte regarded him as management and Lazzell had told him management could talk to management about the unions. Of course, Employer has been observed not to have been consistent in even that position in its urging that it took pains to have management leave the April 23 meeting but left it to be called for and conducted by a contended supervisor. I have found for reasons earlier stated that Heller was not shown to have occupied a supervisory position prior to April 10. The question reserved is whether certain documentation, i.e., the April 27 letter of Petitte, the May 3 statement of Heller, and the reports (post May 8) warrant other conclusion.

To begin with, as above noted, I have no doubt that Heller wanted both his weighmaster job back and the new salary increase(s) when specifically offered. However, the content of the May 3 statement of Heller to the extent it would import that there was long prior agreement on a specific salary increase to $1280 a month, just simply does not comport with the facts otherwise established of record. I conclude and find on the basis of the above evidence that the May 3 documentation was in fact a document generated pursuant to Employer inspiration, and pursued by instruction and direction of Petitte; was not one founded on fact as revealed by the credible record evidence herein; and as such, is revealed itself to be, in substance and effect equally as self-serving in nature as is found to be Petitte's April 27 letter on its face. The reports offered by Employer were equally unconvincing for reasons earlier related. In short I find the documentation offered by Employer wholly inadequate to reveal that Heller prior to April 10, or 19, had occupied a supervisory status. Moreover, in all the above circumstances, I find myself wholly unpersuaded with alternative contention, if raised, that Heller thereafter was effectively constituted and acted as a new supervisor. The credible evidence also clearly reveals that Employer

granted Heller a salary increase in hourly base amount as he was heretofore unlawfully found to have promised employees. It is also clear that Petitte granted Heller specific wage increase which considered most favorably to Employer was at best previously left contingent and indefinite as to amount months earlier; and is then observed to have been granted to a known and leading employee union adherent at a time when the Employer was itself vigorously urging employees, and that employee in particular to guide employees, into forgetting about the Union. I find such constituted unlawful interference by Employer with important Section 7 rights of employees and thus violative of Section 8(a)(1) of the Act. Having found that Heller was not a supervisor at the time Petitte repeatedly questioned Heller about the Union; and variously threatened Heller (and others) with job loss if the employees selected a union, it is clear beyond the questioning that Employer has thereby engaged in extensive unlawful interrogation as to employees' union membership, activities and sympathies, and has interrogated employees as to the union membership, activities and sympathies of their fellow employees (including how they felt about the Union and how they were going to vote); and has variously threatened loss of jobs to employees if they selected a union to represent them, all in violation of Section 8(a)(1) of the Act as alleged in the complaint.[56]

It also follows from the finding that Heller was not a supervisor on or before April 19 that the Union occupied a position of collective-bargaining representative designated by the majority of the employees in the unit heretofore found appropriate.

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[56] In view of the extensive interference, restraint and coercion found therein committed by Petitte, it is deemed unnecessary to consider any further allegation of such conduct by Freeman, the same, if found, being regarded as but clearly cumulative.

I have considered Employer's arguments why a bargaining order should not issue in this case and I find them all without merit under the circumstances set forth above.[57] The litany of violations found need not be repeated. I further find that by refusing the bargaining request of the Union on April 19 which represented a majority of its employees in an appropriate unit, in the light of the unfair labor practices herein found, Employer has further violated Section 8(a)(5) and (1) of the Act and that a bargaining order is necessary and appropriate to protect the majority sentiment as found expressed through the valid authorization cards.[58] Moreover, Respondent Employer had a duty to bargain with the Union as of April 10, the date on which it had attained to a majority and the Respondent set out on its unfair labor practice path to undermine the Union's majority status and make the holding of an election improbable, under applicable principles established by the Board.[59]

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[57] I would only additionally note as to *N.L.R.B.* v. *Pilgrim Foods, Inc.*, 591 F.2d 110 (1st Cir. 1978), and similar such cases, that with all due deference to the view of that Court as to other factors properly to be considered by the Board on the issue of a bargaining order issuance, I am bound to apply established Board precedent, not reversed by the Supreme Court, or the Board, *Fred Jones Manufacturing Company*, 239 NLRB 54 (1978); *Ford Motor Company (Chicago Stamping Plant)*, 230 NLRB 716, 718 fn. 12 (1977).

[58] I specifically conclude and find the unfair labor practices committed by Employer were so pervasive and extensive that the possibility of erasing their effects on the employees and ensuring a fair election by the use of traditional remedies is slight. With employees being so conditioned, I find that in this case, employee sentiment, as expressed by the authorization cards is best protected by a bargaining order. *N.L.R.B.* v. *Gissel Packing Co., Inc.*, 395 U.S. 575 (1969); *Staats and Staats, Inc.*, 254 NLRB No. 105 (1981).

[59] *Trading Port, Inc.*, 219 NLRB 298 (1975); *The Kroeger Co.*, 228 NLRB 149 (1977); and *Honolulu Sporting Goods Co., Ltd.*, 239 NLRB 1277, 1283 (1979).

There remains but to consider the complaint allegation that Heller was constructively discharged and the related alleged threat of reprisal and physical harm to Heller. The latter was obviously itself seriously violative of Section 8(a)(1) of the Act.

Heller's reaction in quitting on May 21 because of asserted pressure he felt on the job after Guseman's delay in taking the established and prompt action called for on Heller's report of coal pollution of the creek, a plant condition itself involving an established responsibility on Heller, and whose performance in regard thereto had been the subject of prior criticism by Petitte, is nonetheless, not an action to be concluded as having been taken in that factual isolation. Resultingly the burden of the required showing of an Employer intended causation of such a termination (the same being then protected as a constructive discharge) is itself not one to be weighed and determined solely in that context, vis-a-vis, as an act involving but speculation on Heller's part and/or instance of unnecessary, and thus unwarranted (unprotected) self-help thereon. The burden otherwise remains on showing that Heller's act of quitting was a reasonable foreseeable reaction to Employer imposed burdensome and discriminatory work circumstances and conditions. For me to otherwise restrictively view, as cause of this termination, the limited circumstances of the creek pollution incident depicted herein, would require my ignoring the other surrounding facts of record: that this employee was theretofore involved and identified as a leading union adherent by the Employer; was the clear brunt of a prior unlawful discharge; was thereafter brought back to work with reward under auspices of stated willingness to reject the Union, and in a former position held which the Employer viewed as confidential; was known by the Employer subsequently to have been unwilling to informally vote the Union out without a Board election; was thereafter and continuously interrogated (despite repeatedly demon-

strated unwillingness to informingly respond); and was threatened with personal and other employee job loss, despite expressed and reported state of nervousness and illness associated with such continuous unlawful Employer conduct; and was then recently further victimized with Employer-sponsored and orchestrated serious threat of individual physical harm and reprisal if he continued his union advocacy. Nor need I ignore that Heller at the time occupied a position with access to Employer supply, production and shipment data which the Employer has acknowledged it did not want in risk of being available to the Union. I find that there is merit in Charging Party's argument that the entirety of Employer's course of conduct is revealed thereby as one designed to force Heller out.[60] If the triggering incident of an unusual delay by Guseman and Heller's personal trepidation of likely criticism by Petitte stands starkly in relief to recent prior physical threat temporarily withstood, Heller's understandable point of view that he could no longer believe what his Employer was saying in the light of what it was doing to him was neither ill grounded, nor its cumulative effect on the employee overlooked. In short this is a case situation in which the familiar tort principle that the transgressor must take its victim as it finds him, would hold equal sway, were it not for the clear showing made that this Employer also already knew, or had cause to know the victim's circumstances of anxiety and disposition to quit. I conclude and find that Employer by an ongoing course of conduct constructively and discriminatorily discharged its employee Richard G. Heller on May 21, in violation of Sections 8(a)(3) and (1) of the Act.

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[60] Cf. *Crystal Princeton Refining Co.*, 222 NLRB 1068, 1069-70 (1976); *Boyles Galvanizing Company*, 239 NLRB 530, 540 (1978). *Dodson IGA Foodliner*, 194 NLRB 192, 193 (1971).

Conclusions of Law

1. Maidsville Coal Company, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The United Mine Workers of America, and United Mine Workers of America, District 31 are labor organizations within the meaning of Section 2(5) of the Act.

3. By unlawfully interrogating employees concerning their union activities, sympathies and desires, and concerning the union activities, sympathies and desires of their coemployees; by unlawfully granting wage increases in order to dissuade employees from supporting the Union, and by promising employees increased hourly wages, improved working conditions and other benefits in order to dissuade employees from selecting the Union as their collective-bargaining representative and/or from engaging in activities on behalf of the Union; by threatening employees with discharge, layoff and cessation or reduction of operations if they selected the Union as their representative, and with nonrecall because of union activities; and by utilizing a third party to threaten employees with reprisals or physical harm if the employees continued to engage in activities on behalf of the Union, Respondent Employer has interfered with, restrained and coerced its employees in the exercise of rights guaranted in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

4. By discriminatorily discharging its employees Earl F. Bowman, William Kent Eddy, Richard G. Heller and Charles L. Trippitt on or about April 23, 1979, and by refusing to reinstate them to their former positions of employment until on or about April 23, 1979; and by thereafter discriminatorily causing the termination of and/or constructively discharging employee Richard G. Heller on or about May 21, 1979, and by thereafter refusing to reinstate him, Respondent has engaged in conduct in violation of Sections 8(a)(3) and (1) of the Act.

5. All production and maintenance employees employed by Respondent at its Maidsville, West Virginia facility; excluding office clerical employees and guards, professional employees and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

6. At all times since April 10, 1979, the United Mine Workers of America has been duly designated by a majority of the employees in the appropriate unit set forth above, and by virtue of Section 9(a) of the Act has been, and is now, the exclusive collective-bargaining representative of all employees in said unit.

7. By refusing since April 10 to recognize and bargain collectively with the Union, and upon demand therefor on or about April 19, Respondent Employer has engaged in conduct in violation of Section 8(a)(5) and (1) of the Act.

8. Except as found herein Respondent Employer has not engaged in any other unfair labor practices as alleged in the complaints.

Remedy

Having found that the Respondent Employer has engaged in certain unfair labor practices, I find it necessary to order the Respondent to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent Employer having wrongfully discharged Earl F. Bowman, William Kent Eddy, Richard G. Heller and Charles L. Trippitt on April 13, 1979 and in violation of Section 8(a)(3) and (1) of the Act, and having thereafter failed and refused to reinstate them until April 23, 1979, and having thereafter wrongfully caused the termination of and/or constructively discharged employee Richard G. Heller on May 21, 1979 and having failed and refused thereafter to reinstate Richard G.

Heller, I find it necessary to order Respondent Employer to offer Richard G. Heller immediate reinstatement to his former job of weighmaster, or if such job no longer exists, to substantially equivalent job, without prejudice to his seniority and other rights and privileges; and to make whole Earl F. Bowman, William Kent Eddy, Charles L. Trippitt and Richard G. Heller, for any loss of earnings they may have suffered by reason of unlawful discrimination against them. The backpay provided herein and any interest due thereon shall be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289, and *Florida Steel Corporation*, 231 NLRB 117 (1977).[61]

Upon the foregoing findings of fact, conclusions of law and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[62]

ORDER

The Respondent, Maidsville Coal Company, Inc., its officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Unlawfully interrogating employees concerning their union activities, sympathies and desires, and concerning the union activities, sympathies and desires of their coemployees;

(b) Granting wage increases in order to dissuade employees from supporting the Union; and from promising employees increased hourly wages, improved working

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[61] See generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[62] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

conditions and other benefits in order to dissuade employees from selecting the Union as their collective-bargaining representative, and/or from engaging in activities on behalf of the Union;

(c) Threatening employees with discharge, layoff and cessation or reduction of operations if they select the Union as their representative, and with nonrecall because of their union activities; and utilizing a third party to threaten employees with reprisal or physical harm if the employees continue to engage in activities on behalf of the Union;

(d) Discharging, or causing the termination of employees because of their membership in and activities on behalf of the Union, and/or in order to discourage membership in the Union.

(e) Refusing to recognize and bargain collectively with the United Mine Workers of America, as the designated exclusive collective-bargaining representative of an appropriate unit of all production and maintenance employees employed by Respondent at its Maidsville, West Virginia facility; excluding office clerical employees and guards, professional employees and supervisors as defined in the Act.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action which will effectuate the policies of the Act.

(a) Offer immediate and full reinstatement to Richard G. Heller to his former job, or if that job no longer exists, to a substantially equivalent job, without prejudice to his seniority or other rights and privileges; and make employees Earl F. Bowman, William Kent Eddy, Charles L. Trippitt and Richard G. Heller whole in the manner described in the section herein entitled Remedy;

(b) Recognize, and upon demand bargain collectively with the United Mine Workers of America as the duly designated exclusive representative of the employees in the appropriate unit described above.

(c) Preserve and, upon request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Maidsville, West Virginia facility, copies of the attached notice marked "Appendix A."[63] Copies of the notice on forms provided by the Regional Director for Region 6, after being duly signed by the Company's authorized representative, shall be posted by the Company immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Company to ensure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 6, in writing, within 20 days of the date of this Order, what steps it has taken to comply herewith.

Dated, Washington, D.C. March 16, 1981

/s/ Robert G. Romano
ROBERT G. ROMANO
Administrative Law Judge

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[63] In the event the Board's Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

[SEAL] [SEAL]

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

WE WILL NOT unlawfully interrogate our employees concerning their union activities, sympathies and desires, and concerning the union activities, sympathies and desires of their coemployees.

WE WILL NOT unlawfully grant our employees wage increases in order to dissuade employees from supporting the UNITED MINE WORKERS OF AMERICA, or its DISTRICT 31; and WE WILL NOT promise our employees increased hourly wages, improved working conditions and other benefits in order to dissuade employees from selecting the Union as their collective-bargaining representative and/or from engaging in activities on behalf of the Union.

WE WILL NOT threaten our employees with discharge, layoff and cessation or reduction of operations if they select the Union as their representative, and with nonrecall because of union activities; and WE WILL NOT utilize a third party to threaten employees with reprisal or physical harm if employees continue to engage in activities on behalf of the Union.

WE WILL NOT discriminatorily discharge, or cause the termination of and/or constructively discharge employees; and WE WILL offer RICHARD G. HELLER immediate reinstatement to his former job of weighmaster, or if such job no longer exists, to substantially equivalent job, without prejudice to his seniority and other rights and privileges; and WE WILL make whole employees EARL F. BOWMAN, WILLIAM KENT EDDY, CHARLES L. TRIPPITT and RICHARD G. HELLER, for any loss of earnings they may have suffered by reason of unlawful discrimination against them.

WE WILL NOT refuse to recognize the UNITED MINE WORKERS OF AMERICA, as the designated exclusive collective-bargaining representative of an appropriate unit of employees at our Maidsville, West Virginia facility. The appropriate bargaining unit is:

> All production and maintenance employees employed at our Maidsville, West Virginia facility; excluding office clerical employees and guards, professional employees and supervisors as defined in the Act.

WE WILL, upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the above-described appropriate unit with respect to rates of pay, hours of employment, and other terms and conditions of employment of the employees included within the appropriate bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

MAIDSVILLE COAL COMPANY, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Porter Building, 10th Floor, 601 Grant Street, Pittsburgh, Pennsylvania 15219, Telephone No. (412) 644-2969.

Office - Supreme Court, U.S.
FILED
FEB 14 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1073

In the Supreme Court of the United States

OCTOBER TERM, 1983

MAIDSVILLE COAL COMPANY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the National Labor Relations Board reasonably concluded that petitioner's violations of the National Labor Relations Act — which included discriminatory discharges, threats of job loss, a threat of physical harm and numerous other unfair labor practices — precluded the holding of a fair election and therefore warranted the issuance of a bargaining order based on authorization cards.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statute involved 1

Statement 2

Argument 9

Conclusion 15

TABLE OF AUTHORITIES

Cases:

Automated Business Systems v. *NLRB*, 497 F.2d 262 12

Chromalloy Mining & Minerals v. *NLRB*, 620 F.2d 1120 12

Coating Products, Inc. v. *NLRB*, 648 F.2d 108 14

Donn Products, Inc. v. *NLRB*, 613 F.2d 162 14

First Lakewood Associates v. *NLRB*, 582 F.2d 416 14

Hedstrom Co. v. *NLRB*, 629 F.2d 305, cert. denied, 450 U.S. 996 12

Justak Bros. v. *NLRB*, 664 F.2d 1074, enforcing 253 N.L.R.B. 1054 ..... 10, 11, 14

NLRB v. *American Spring Bed Mfg. Co.*, 670 F.2d 1236 ..... 13, 14

NLRB v. *Berger Transfer & Storage Co.*, 678 F.2d 679, enforcing 253 N.L.R.B. 5 14

Page

Cases—Continued:

NLRB v. *Century Moving & Storage, Inc.*, 683 F.2d 1087 ..... 13, 14

NLRB v. *Davis*, 642 F.2d 350, enforcing 243 N.L.R.B. 837 14

NLRB v. *Gissel Packing Co.*, 395 U.S. 575 ..... 8, 9, 10, 11, 12, 13

NLRB v. *Hasbro Industries, Inc.*, 672 F.2d 978, enforcing 254 N.L.R.B. 587 14

NLRB v. *Hendel Mfg. Co.*, 483 F.2d 350 14

NLRB v. *Jamaica Towing, Inc.*, 632 F.2d 208 ..... 10, 11, 14

NLRB v. *L. B. Foster Co.*, 418 F.2d 1, cert. denied, 397 U.S. 990 12

NLRB v. *Lou De Young's Market Basket, Inc.*, 430 F.2d 912 10

NLRB v. *Marion Rohr Corp.*, 714 F.2d 228 ..... 13, 14

NLRB v. *Matouk Industries, Inc.*, 582 F.2d 125 14

NLRB v. *Miller Trucking Service, Inc.*, 445 F.2d 927 13-14

NLRB v. *Pace Oldsmobile, Inc.*, 681 F.2d 99 13

NLRB v. *Pacific Southwest Airlines*, 550 F.2d 1148, enforcing 201 N.L.R.B. 647 ..... 10, 12, 14

Page

Cases—Continued:

NLRB v. *Pilgrim Foods, Inc.*, 591 F.2d 110 ..... 13, 14

NLRB v. *Rexair, Inc.*, 646 F.2d 249 13

NLRB v. *Wilhow Corp.*, 666 F.2d 1294, enforcing 244 N.L.R.B. 303 ..... 10, 11, 14

Peerless of America, Inc. v. *NLRB*, 484 F.2d 1108 ..... 13, 14

Red Oaks Nursing Home, Inc. v. *NLRB*, 633 F.2d 503 ..... 13, 14

Standard-Coosa-Thatcher Carpet Yarn Division, Inc. v. *NLRB*, 691 F.2d 1133, cert. denied, No. 82-1261 (Apr. 18, 1983) 8, 10, 11

United Services for the Handicapped v. *NLRB*, 678 F.2d 661 14

Statute:

National Labor Relations Act, 29 U.S.C. (& Supp. V) 151 *et seq.* 1

Section 8(a)(1), 29 U.S.C. 158(a)(1) 6

Section 8(a)(3), 29 U.S.C. 158(a)(3) 6

Section 8(a)(5), 29 U.S.C. 158(a)(5) 6

In the Supreme Court of the United States

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No. 83-1073

MAIDSVILLE COAL COMPANY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. A1-A5) is reported at 718 F.2d 658. The opinion of the panel of the court of appeals that decided this case initially (Pet. App. A6-A26) is reported at 693 F.2d 1119. The decision and order of the National Labor Relations Board (Pet. App. A29-A136) are reported at 257 N.L.R.B. 1106.

JURISDICTION

The judgment of the en banc court of appeals was entered on October 5, 1983. The petition for a writ of certiorari was filed on December 30, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Relevant provisions of the National Labor Relations Act, 29 U.S.C. (& Supp. V) 151 *et seq.*, are set forth at Pet. 2-4.

STATEMENT

Upon finding that petitioner had committed repeated unfair labor practices "of such a pervasive and extensive nature that [the Board's] ordinary and usual remedies would not erase them sufficiently so as reasonably to insure the future holding of a fair election" (Pet. App. A30 n. 1), the Board issued a bargaining order on the basis of authorization cards signed by a majority of bargaining unit employees. Petitioner does not dispute the Board's unfair labor practice findings, but contends only that the Board failed to offer an adequate explanation for its choice of remedies (Pet. 7-13).

1. Petitioner is engaged in the preparation and sale of specialized coal to industrial users at its facility in Maidsville, West Virginia (Pet. App. A36). In March 1979,[1] the United Mine Workers of America, District 31 (the Union) began an organizing campaign among production and maintenance employees at the Maidsville plant. Union organizers contacted individual employees, and, by April 10, the Union had obtained authorization cards signed by five of the nine unit employees (*id.* at A69-A72).[2] On April 19, the Union formally requested petitioner to recognize and bargain with the Union, but petitioner refused (*id.* at A92-A93). On April 20, the Union filed a petition for an election with the Board (*id.* at A109 n.48).

Meanwhile, shortly after the Union began its organizing activities, petitioner, through both its supervisors and

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[1]All dates are in 1979, unless otherwise noted.

[2]Before the Board, the parties contested the unit status of several employees, including a sixth employee who signed a union authorization card on April 11. The Board ultimately determined that a majority of the employees appropriately within the unit had signed cards as of April 10 (Pet. App. A37-A69). Petitioner does not contest that finding in this Court.

senior officials, embarked on a campaign of threats, promises, wage increases, coercive interrogations, and discharges in an effort to dissuade union supporters from selecting the Union as their bargaining representative. In late March, supervisor James Freeman, who had earlier learned of the Union's campaign through conversations with an organizer, asked employee Charles Trippitt whether he had signed a union card.[3] When Trippitt replied that he had not, Freeman told Trippitt that "there would be no union; that he might as well forget it; and that the Petittes [president and vice-president of petitioner] * * * would put their hardhats on and run the place themselves" (Pet. App. A74). Sometime in early April, Freeman told plant superintendent Charles Guseman of the organizing efforts (*id.* at A75).

On April 4, Guseman granted hourly wage increases to employees Kenneth Roberson and Howard Tennant (Pet. App. A72). On April 9 and 10, employees Earl Bowman, Trippitt, Roberson, Richard Heller, and Willard Eddy signed union authorization cards (*id.* at A71). On April 10 and 11, petitioner's president, John Petitte, informed employees Bowman, Trippitt, and Eddy that they were being granted hourly wage increases effective April 18 (*id.* at A72-A73). Petitte promised Eddy that if things went well he would receive another raise in six to eight months (*id.* at A73). Other employees also were granted raises effective April 18 (*id.* at A72). Finally, on the evening of April 10, Freeman again told employees Trippitt and Bowman that they should forget about the Union and that the Petittes would run the operation themselves rather than deal with the Union (*id.* at A74-A75).

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[3]Although Freeman was not formally designated as a supervisor, the Board found that he was in effect a supervisor within the meaning of the Act by virtue of his job functions (Pet. App. A55 & n.15). The Union was unaware of Freeman's status at the outset of its organizing campaign (*id.* at A69-A70).

On April 12, President Petitte asked Bowman whether a union organizer had been to his house and what Bowman had told him. Petitte promised Bowman another raise during the summer, and also told him that Petitte could not afford a union and that he would lay off the employees and run the plant himself if the Union was voted in. Petitte told Bowman to keep his father away from the company because he believed that the union mine where Bowman's father worked was the source of petitioner's union problem. Pet. App. A81-A83.

On the afternoon of April 12, petitioner decided to terminate Bowman, Trippitt, Eddy, and Heller in order to forestall unionization. These employees were notified of their discharges on April 13, 14, and 15. Pet. App. A89-A92.

In response to the Union's bargaining demand of April 19, President Petitte contacted his lawyer, who advised him to reinstate the four discharged employees. Petitioner offered reinstatement to all four, but continued to offer additional raises and benefits, to interrogate employees about the union campaign, and to threaten retaliation if the Union won. On April 20, foreman James Casino asked Heller what he knew about the union campaign. Later that day, Petitte drove to Heller's house and, while offering reinstatement with raises to Heller and Eddy, threatened to lay them off if the Union was voted in. Pet. App. A93-A100. On the other hand, Petitte solicited grievances and proposals from the employees, offered to develop a pension plan, and said he would grant a pay increase, vacation pay, and paid holidays as soon as the Union was voted out. He asked Heller to act as spokesman for the employees. *Id.* at 96-100. Petitte returned to Heller's house the following day to report on his progress in developing the pension plan and to schedule a meeting for April 23 to discuss the proposals (*id.* at A100-A102). Finally, on April 23, Freeman offered reinstatement

to Bowman, told him to forget about the Union, and said that additional raises would be forthcoming (*id.* at A94-A95).

On the afternoon of April 23, petitioner held a meeting with all employees and explained that, because the Union had filed a representation election petition with the Board, petitioner could not negotiate with or make promises to the employees (Pet. App. A108-A109). However, at a later meeting of employees at which supervisor Freeman was present,[4] Freeman solicited a unanimous vote in favor of proposals that the employees wanted to make to the company and then stated that if the Union were voted out the proposals would be effective immediately (*id.* at A110). Over the objections of employees Heller, Eddy, Bowman, and Trippitt (*id.* at A111), Freeman stated that "if it took all day long they were going to * * * vote the Union out" (*id.* at A110). With those four employees abstaining, five employees—including one who had earlier expressed interest in the Union but had just received a $1.50 per hour wage increase, and employee Roberson, who had earlier signed a union card—voted against the Union (*id.* at A71-A72, A110-A111). At Freeman's urging, the vote was recorded by a notary public in petitioner's employ, and the document was given to President Petitte (*id.* at A112). The four recalled employees then were given checks to cover backpay (*ibid.*).

Subsequently, Petitte embarked on a vigorous campaign of interrogations and threats of job loss directed at employee Heller. On April 24 and 25, on May 2, and on almost every day thereafter for several weeks, Petitte approached Heller with questions about employee sentiment toward the Union and threats of layoffs if the Union were voted in. The

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[4]Management officials excused themselves from the employees' meeting, but because Freeman was not formally designated as a supervisor he was permitted to stay (Pet. App. A110).

questioning upset Heller to the point that he became ill on the job and was advised by his doctor to take some time off. Pet. App. A112-A121.

On May 17, a man who was about six feet tall and weighed 250 pounds, with "great big arms and neck" (Pet. App. A122), approached Heller at work after talking with President Petitte. He pointed his finger at Heller, backed him into a corner, and asked " '[w]hat's this I hear about a labor problem down here?' " (*ibid.*). Continuing to shake his finger in Heller's face, the man then said, " 'I'm going to tell you something, I don't want to hear no more about a labor problem down here. The Petittes don't want a union down here, so I better not hear no more about it' " (*ibid.*). On May 21, Heller quit his employment with petitioner because " 'it's just too much pressure, I can't take it anymore' " (Pet. App. A124).

2. The Board, adopting the findings and conclusions of the administrative law judge, found that petitioner violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1), by refusing to bargain with the Union on and after April 19. The Board further found that petitioner violated Section 8(a)(3) and (1) of the Act, 29 U.S.C. 158(a)(3) and (1), by discharging employees Bowman, Eddy, Heller, and Trippitt on April 12, and by constructively discharging employee Heller on May 21, because of their union activity. The Board found that petitioner violated Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1), by interrogating employees about their union activities and the activities of their coworkers; by granting wage increases in order to dissuade employees from supporting the Union; by promising further raises and other benefits; by threatening employees with layoffs, discharge, cessation or reduction of operations, and nonrecall because of union activities; and by threatening an employee with physical harm if he continued to engage in union activities. Pet. App. A29-A30 & n.1, A130-A131.

Finding that "a fair election has been precluded by [petitioner's] unfair labor practices," the Board ordered petitioner to recognize and bargain with the Union on the basis of the authorization cards signed by a majority of the unit employees.[5] In explaining the basis for its conclusion that a bargaining order was the appropriate remedy, the Board stated (Pet. App. A30 n.1):

> [W]e note that the Employer engaged in repeated violations of Sec. 8(a)(1) and (3) of the Act and that these violations were of such a pervasive and extensive nature that our ordinary and usual remedies would not erase them sufficiently so as reasonably to insure the future holding of a fair election. In particular, the evidence establishes that, at the outset of its employees' union organizational activities, the Employer commenced a campaign designed to undermine and erode the Union's majority support among its employees by discharging four identified union supporters on the sole basis of these employees' union sentiments. At the same time, the Employer violated the Act by interrogating employees concerning their union activities and sentiments; by granting wage increases; by making various promises of improved working conditions and benefits in order to dissuade employees from supporting the Union; and by threatening employees with discharge, layoff, and other reprisals, including the cessation or reduction of operations, if they continued to engage in activities on behalf of the Union. Thereafter, the Employer enlisted the aid of a third party to threaten an employee with physical harm if he continued to support the Union.

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[5] In addition, the Board ordered petitioner to offer reinstatement with full backpay to employee Heller and full backpay to the other employees who had previously been discharged and reinstated, and to cease and desist from the unfair labor practices found and from any like or related conduct (Pet. App. A33, A132-A134).

> Under these circumstances, including the small size of the employee complement in question and the substantial percentage of the work force subjected to the Employer's unlawful terminations and other unfair labor practices, we find that a bargaining order is necessary and appropriate in order to protect the majority sentiment expressed through the authorization cards and to otherwise remedy the violations committed.

3. A divided panel of the court of appeals upheld the Board's unfair labor practice findings but declined to enforce the Board's order and remanded the case on the ground that the Board had failed to advance reasons sufficient to justify its choice of a bargaining order over a traditional cease-and-desist remedy (Pet. App. A10 & n.3, A11-A12). The Board then petitioned for rehearing en banc, the petition was granted, and the panel's decision was vacated. On rehearing, the en banc court enforced the Board's bargaining order (*id.* at A1-A5). The court stated that the principal purpose of "requiring specificity in the Board's findings and reasoning" when it issues bargaining orders "is to facilitate an informed review" (*id.* at A4). " 'To facilitate review under [the *Gissel* [6]] standards, the Board must support a *Gissel* order by a statement of reasons stating what unfair labor practices the order is intended to redress and indicating in general why traditional remedies are inadequate in the circumstances' " (*id.* at A5 (quoting *Standard-Coosa-Thatcher Carpet Yarn Division, Inc.* v. *NLRB*, 691 F.2d 1133, 1144 (4th Cir. 1982), cert. denied, No. 82-1261 (Apr. 18, 1983)). Employing that standard, the en banc court found that the Board's order in this case

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[6]See *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969), discussed at pages 9-12, *infra*.

sufficiently articulated its findings and reasons in support of a bargaining order (Pet. App. A5).[7]

ARGUMENT

In *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 594 (1969), this Court sustained the Board's authority to issue bargaining orders in cases in which "serious unfair labor practices" have been committed "that interfere with the election processes and tend to preclude the holding of a fair election." The Court approved the Board's issuance of bargaining orders not only in " 'exceptional' " cases marked by " 'outrageous' " unfair labor practices (Category I cases) (395 U.S. at 613-614), but also in cases in which the unfair labor practices are "less pervasive," but the Board nevertheless finds "that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through [authorization] cards would, on balance, be better protected by a bargaining order" (Category II cases) (*id.* at 614-615). The Court also emphasized that (*id.* at 612 n.32):

> It is for the Board and not the courts * * * to make that determination, based on its expert estimate as to the effects on the election process of unfair labor practices of varying intensity. In fashioning its remedies under the broad provisions of § 10(c) of the Act * * *, the Board draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given special respect by reviewing courts.

Petitioner no longer disputes the Board's unfair labor practice findings. Nor does it appear to challenge the conclusion that its unfair labor practices—which included

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[7]Four judges dissented from the en banc decision of the court of appeals for the reasons expressed by the original panel majority (Pet. App. A5).

repeated threats of job loss, interrogations by supervisors and the company president, the discharge of nearly half the bargaining unit employees for engaging in union activities, and a subsequent threat of physical harm to one of the union adherents — were the kind of serious violations that may warrant a bargaining order. Rather, petitioner contends (Pet. 7-13) that the Board's explication of the need for a bargaining order in this case does not meet the requirements of *Gissel* for the issuance of a Category II bargaining order and that the court of appeals' enforcement of the Board's order conflicts with decisions of other circuits.[8] This Court recently rejected an identical challenge to a bargaining order when it denied the petition for a writ of certiorari to review *Standard-Coosa-Thatcher Carpet Yarn Division, Inc.* v. *NLRB*, 691 F.2d 1133 (4th Cir. 1982), cert. denied, No. 82-1261 (Apr. 18, 1983), the decision that the en banc court of appeals followed here (see pages 8-9, *supra*). As in that case, there is no merit to petitioner's contentions here, and there is likewise no need for this Court's review.

1. In concluding that "a fair election has been precluded by [petitioner's] unfair labor practices" (Pet. App. A29-A30 n.1, A127), the Board carefully considered not only the extent of the unfair labor practices and their past effect on the election process, but also their continuing effect. The Board found that the Union represented a majority of

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[8]Petitioner does not contend that there is any conflict among the circuits over the proposition that unfair labor practices of the scope and nature involved here represent the kind of violations that constitute a *Gissel* Category II case. Indeed, the courts of appeals have consistently held that unlawful discharges and threats of job loss are sufficient to justify a Category II bargaining order. See, *e.g.*, *Justak Bros.* v. *NLRB*, 664 F.2d 1074, 1081-1082 (7th Cir. 1981); *NLRB* v. *Wilhow Corp.*, 666 F.2d 1294, 1305 (10th Cir. 1981); *NLRB* v. *Jamaica Towing, Inc.*, 632 F.2d 208, 212-213 (2d Cir. 1980); *NLRB* v. *Pacific Southwest Airlines*, 550 F.2d 1148, 1150-1151 (9th Cir. 1977); *NLRB* v. *Lou De Young's Market Basket, Inc.*, 430 F.2d 912, 915 (6th Cir. 1970).

petitioner's employees when it requested and was refused recognition by petitioner, and that petitioner committed "pervasive and extensive" violations of the Act in an antiunion campaign that began "at the outset of its employees' union organizational activities" and continued after the Union had filed a petition for a representation election (*id.* at A29-A30 n.1, A109). The effect of this campaign was to cause an actual dissipation of the previously expressed union majority (*id.* at A110). The Board relied on the unlawful discharges of nearly half the unit employees, the threat of physical harm directed at employee Heller, the numerous threats of job loss and reprisals, and the coercive interrogations, all of which were set forth in detail in the ALJ's 100-page decision (*id.* at A34-A136). As this Court and the courts of appeals have observed, unfair labor practices such as those committed by petitioner "are more effective to destroy election conditions for a longer period of time than others." *Gissel*, 395 U.S. at 611 n.31; *Standard-Coosa-Thatcher*, 691 F.2d at 1145.[9] Moreover, as the Board found, such unfair labor practices are more likely to have a lasting inhibitive effect where, as here, the bargaining unit affected is small and a substantial percentage of the unit employees have been subjected to the employer's coercive practices (Pet. App. A29-A30 n.1).[10]

These findings plainly are sufficient to meet the requirement of *Gissel* that, in a Category II situation, the Board must determine that "the possibility of erasing the effects of past practices and of ensuring a fair election * * * by the use of traditional remedies * * * is slight and that employee sentiment once expressed through cards would, on balance,

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[9]See also cases cited at page 10 note 8, *supra*.

[10]See, *e.g.*, *Justak Bros.* v. *NLRB*, 664 F.2d at 1082; *NLRB* v. *Wilhow Corp.*, 666 F.2d at 1305; *NLRB* v. *Jamaica Towing, Inc.*, 632 F.2d at 216.

be better protected by a bargaining order" than an election (395 U.S. at 614-615). Contrary to petitioner's apparent contention (Pet. 7-9), the Court in *Gissel* did not impose any rigid analytic framework on the Board or require the Board to recite its findings in any particular verbal formulation. Indeed, the Court in *Gissel* noted that the requisite findings were probably implicit in the Board's decisions to issue bargaining orders (395 U.S. at 613). The Court remanded three of the four cases under review for additional findings only because both the Board and the Court discarded the Board's prior practice of requiring the Board "to phrase its findings in terms of an employer's good or bad faith doubts [concerning the union's majority status]" (395 U.S. at 616). No such extraneous findings infected the Board's decision in the instant case, and it is thus fully consistent with *Gissel*.[11]

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[11]There is no merit in petitioner's contention (Pet. 8) that the Board erred by refusing to consider employee turnover in evaluating the lasting effects of the unfair labor practices involved here. The turnover that had occurred by the time of the hearing before the administrative law judge was insignificant; six of the original union supporters — the five who had signed cards and employee Fain — were still employed by petitioner at that time (GC Exh. 2). Moreover, the affidavit presented by petitioner to the original panel of the court of appeals (Pet. App. A27-A28) indicates that a number of employees were added to the work force after issuance of the Board's bargaining order. It is settled that changes in the work force occurring after issuance of the order are not material; were the rule otherwise, the process of securing court enforcement of a bargaining order would be the very means of its nullification and would encourage continuing litigation by a wrongdoing employer. See *Automated Business Systems* v. *NLRB*, 497 F.2d 262, 275 n.12 (6th Cir. 1974); accord, *Hedstrom Co.* v. *NLRB*, 629 F.2d 305, 312 (3d Cir. 1980) (en banc), cert. denied, 450 U.S. 996 (1981); *Chromalloy Mining & Minerals* v. *NLRB*, 620 F.2d 1120, 1131-1133 (5th Cir. 1980); *NLRB* v. *Pacific Southwest Airlines*, 550 F.2d 1148, 1152-1153 & n.5 (9th Cir. 1977); *NLRB* v. *L.B. Foster Co.*, 418 F.2d 1, 4 (9th Cir. 1969), cert. denied, 397 U.S. 990 (1970).

Petitioner also contends (Pet. 8) that the Board erred by failing expressly to consider the likelihood of future unfair labor practices in

2. Petitioner contends (Pet. 9-12) that the decision below conflicts with decisions in the First, Second, Sixth, Seventh, Ninth, and Tenth Circuits.[12] But the asserted conflict among the circuits has nothing to do with the circumstances in which it is appropriate for the Board to issue bargaining orders; the governing principles were established in *Gissel*, and the courts of appeals have generally followed them. Instead, petitioner contends that the courts of appeals are in conflict over the degree of factual analysis by the Board that is required for meaningful judicial review. Upon examination, it is apparent that petitioner's assertion of a conflict reflects nothing more than the fact that in some cases the courts have criticized the Board's explanation of its decision to issue a bargaining order as being too sketchy to permit meaningful judicial review,[13] while in other cases the courts

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light of petitioner's decision to seek legal counsel during the middle of the campaign. However, as the Court held in *Gissel*, 395 U.S. at 612 (footnote omitted), "a bargaining order is designed as much to remedy past election damage as it is to deter future misconduct." The rationale is simple (*ibid.*): "If an employer has succeeded in undermining a union's strength and destroying the laboratory conditions necessary for a fair election, he may see no need to violate a cease-and-desist order by further unlawful activity." In any event, the record shows that petitioner continued to commit serious unfair labor practices even after seeking counsel by, inter alia, promising to grant benefits if the Union were voted out and engaging in repeated unlawful interrogation and harassment of a primary union adherent—Heller—causing his constructive discharge.

[12]Petitioner concedes (Pet. 12) that the court of appeals' opinion is consistent with decisions in the Third, Fifth, and Eighth Circuits.

[13]See, *e.g.*, *NLRB* v. *Marion Rohr Corp.*, 714 F.2d 228, 230-231 (2d Cir. 1983); *NLRB* v. *Century Moving & Storage, Inc.*, 683 F.2d 1087, 1093 (7th Cir. 1982); *NLRB* v. *Pace Oldsmobile, Inc.*, 681 F.2d 99, 101-102 (2d Cir. 1982); *NLRB* v. *American Spring Bed Mfg. Co.*, 670 F.2d 1236, 1247-1248 (1st Cir. 1982); *NLRB* v. *Rexair, Inc.*, 646 F.2d 249, 251 (6th Cir. 1981); *Red Oaks Nursing Home, Inc.* v. *NLRB*, 633 F.2d 503, 508-511 (7th Cir. 1980); *NLRB* v. *Pilgrim Foods, Inc.*, 591 F.2d 110, 119 (1st Cir. 1978); *Peerless of America, Inc.* v. *NLRB*, 484 F.2d 1108, 1118-1119 (7th Cir. 1973); *NLRB* v. *Miller Trucking*

have found the Board's explanation sufficient (see Pet. 12-13 and page 10 note 8, *supra*). Significantly, all of the circuits that petitioner asserts are in conflict with the Fourth Circuit have enforced Board bargaining orders supported by findings similar to the Board's findings in this case.[14] It is thus apparent that no significant legal conflict exists; instead, the cases cited by petitioner demonstrate only that different factual circumstances will produce different results. Such an unremarkable phenomenon does not warrant this Court's review.

Service, Inc., 445 F.2d 927, 931-932 (10th Cir. 1971). Significantly, in many of these cases the courts refused to enforce Board bargaining orders not only because of a perceived insufficiency in the Board's stated rationale, but because the Board's unfair labor practice findings were either set aside or found not to be of sufficient magnitude to warrant bargaining orders. See, *e.g.*, *Marion Rohr Corp.*, 714 F.2d at 230-231; *Century Moving & Storage, Inc.*, 683 F.2d at 1094; *American Spring Bed Mfg. Co.*, 670 F.2d at 1248; *Red Oaks Nursing Home, Inc.*, 633 F.2d at 510-511; *Donn Products, Inc.* v. *NLRB*, 613 F.2d 162, 166-167 (6th Cir. 1980); *Pilgrim Foods, Inc.*, 591 F.2d at 120; *First Lakewood Associates* v. *NLRB*, 582 F.2d 416, 423-424 (7th Cir. 1978); *Peerless of America, Inc.*, 484 F.2d at 1120-1122.

[14]See, *e.g.*, *United Services for the Handicapped* v. *NLRB*, 678 F.2d 661, 664-665 (6th Cir. 1982); *NRLB* v. *Berger Transfer & Storage Co.*, 678 F.2d 679, 693-694 (7th Cir. 1982), enforcing 253 N.L.R.B. 5, 14 (1980); *NLRB* v. *Hasbro Industries, Inc.*, 672 F.2d 978, 989-990 (1st Cir. 1982), enforcing 254 N.L.R.B. 587, 594-595 (1981); *NLRB* v. *Wilhow Corp.*, 666 F.2d 1294, 1305 (10th Cir. 1981), enforcing 244 N.L.R.B. 303, 315 (1979); *Justak Bros.* v. *NLRB*, 664 F.2d 1074, 1081-1082 (7th Cir.), enforcing 253 N.L.R.B. 1054, 1084-1085 (1981); *Coating Products, Inc.* v. *NLRB*, 648 F.2d 108, 109 (2d Cir. 1981); *NLRB* v. *Davis*, 642 F.2d 350, 354-356 (9th Cir. 1981), enforcing 243 N.L.R.B. 837, 845 (1979); *NLRB* v. *Matouk Industries, Inc.*, 582 F.2d 125, 130 (1st Cir. 1978); *NLRB* v. *Pacific Southwest Airlines*, 550 F.2d 1148, 1152 (9th Cir. 1977), enforcing 201 N.L.R.B. 647, 657 (1973); *NLRB* v. *Hendel Mfg. Co.*, 483 F.2d 350, 353 (2d Cir. 1973). See also *NLRB* v. *Jamaica Towing, Inc.*, 632 F.2d 208, 212-215 (2d Cir. 1980).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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